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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted] 11

KER AND COMPANY, PLAINTIFFS IN ERROR,

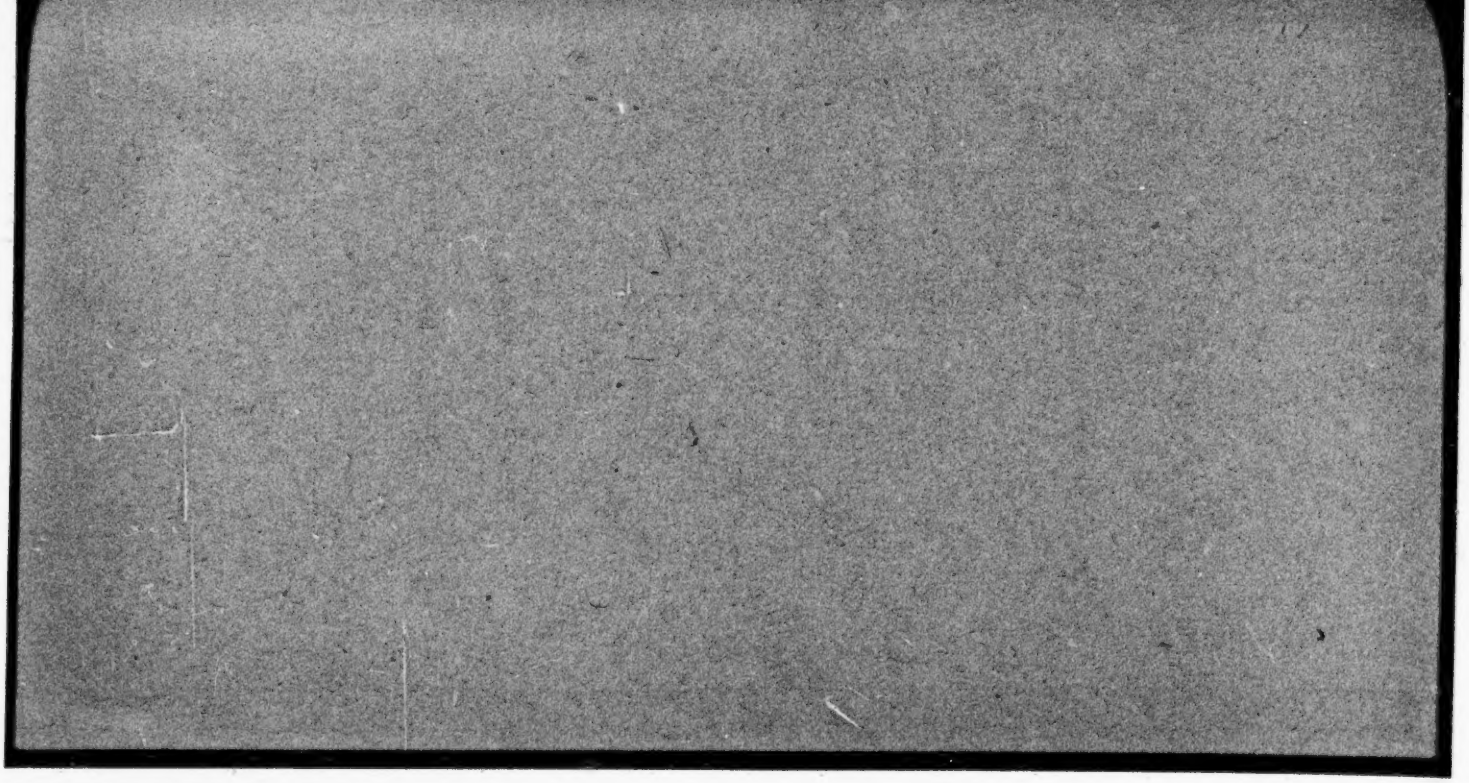
vs.

ALBERT R. COUDEN.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED FEBRUARY 16, 1909.

(21,517.)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 25, 1909.

1 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 2394.

KER & COMPANY, a Mercantile Partnership, Plaintiff and Appellant,
versus
ALBERT R. COUDEN, Defendant and Appellee.

Be it remembered, that on the 25th day of January, 1905, there was filed in said Court, in said cause, a bill of exceptions which reads in words and figures as follows, to wit:

ESTADOS UNIDOS DE AMÉRICA,
Islas Filipinas:

En el Juzgado de Primera Instancia de la Provincia de Cavite.

Causa Civil Núm. 179.

KER Y COMPAÑIA, una Sociedad en Comandita, Demandante,
contra
ALBERT R. COUDEN, Demandado.

Pieza de Excepciones.

Iniciose el presente juicio en Diciembre de 1903 sobre demanda cuyo original fué radactado en inglés y acompañdo de una
2 traducción al castellano, y la cual, copiada literalmente es del tenor siguiente:

(Encabezamiento Juzgado y Causa.)

"El demandante expone:

I.

"Que el demandante es, y á todas las épocas mencionadas á continuación en la presente ha sido, una sociedad en comandita, debidamente constituida y existente con arreglo á las leyes de las Islas Filipinas, y debidamente registrada en el Registro Mercantil en Manila, Islas Filipinas.

II.

"Que el demandante es, y á todas las épocas mencionadas á continuación en la presente ha sido, el dueño absoluto y con derecho á la posesión de una cierta parcela de terreno, en su totalidad, constituyendo una parte de lo conocido por Punta-Sangley; sito y estando dentro del distrito municipal de San Roque, provincia de

Cavite, Isla de Luzón, Islas Filipinas, lindante por el Norte con la Bahía de Manila; por el Este con la Bahía de Manila y la Encenada de Cañacao; por el Sur con la Bahía de Manila, encenada de Cañacao y la linde nordestal del terreno del Varadero de Manila; y, por una prolongación directa de la referida linde nordestal en línea recta al noroeste hasta la Bahía de Manila; y por el Oeste con la referida linde nordestal del mencionado Varadero, y por la referida prolongación de la misma, y por la Bahía de Manila.

"Que un diagrama de la referida propiedad vá adjunto á esta demanda, señalado 'Documento A,' al cual se refiere el demandante haciendo el mismo parte de esta demanda.

3 "Que no puede el demandante suministrar una descripción por medidas y linderos de la referida propiedad ni especificar el contenido superficial de la misma, porque el demandado, aunque se le haya requerido al efecto, se ha negado y aún se niega á permitir el que hace el demandante el apeo de la misma, ó suministrar cualesquiera informes respecto á los linderos de la superficie de la dicha propiedad.

III.

"Que el demandado con anteriodidad á la fecha actual, á saber, en el día 17 de Noviembre de 1902, contra la voluntad y consentimiento de este demandante, y sin derecho á hacerlo, tomó posesión del terreno descrito en párrafo que precede y de todas las partes del mismo, y desde la fecha últimamente nombrada ha retenido la posesión del referido terreno y de la totalidad del mismo, contra la voluntad y el consentimiento de este demandante y sin derecho alguno de hacerlo.

IV.

"Que el demandante ha requerido, en debida forma, al demandado le entreguese este la posesión del referido torreno, pero el demandado se negó y continúa negándose á entregar dicho terreno al demandante.

V.

"Que, por motivo de los actos precitados del demandado, el demandante ha sufrido daños en una suma de más de mil quinientos dollars ($1,500), moneda de los Estados Unidos, mensualmente, en todos y cada uno de los menses desde el día 17 de Noviembre de 1902.

"Por tanto, suplica el demandante se dicte sentencia contra el demandado por la posesión del referido terreno, y en daños

4 en la cantidad mil quinientos dollars ($1,500), moneda de los Estados Unidos, mensualmente, en todos y cada uno de los meses desde el aludido día 17 de Noviembre de 1902 hasta que se haya entregado la posesión al demandante por el demandado, junto con los intereses y las costas del pre-ente juicio.

(Firmado) "LYON & WOLFSON,
(Firmado) "OSCAR SUTRO,
"*Abogados del Demandante.*

"ESTADOS UNIDOS DE AMERICA.
Islas Filipinas, Ciudad de Manila, ss:

"James M. Beattie, después de juramentado en debida forma, depone y dice: Que es uno de los socios de la sociedad demandante á la cual se refiere la demanda que precede; que ha leido la anterior demanda, y está enterado de su contenido; y que la misma queda cierta, salvo respecto á los asuntos expuestos allá según informes y creencia; y que, respecto á esos asuntos, cree que es cierta.

(Firmado) "JAS. M. BEATTIE.

"Suscrito y jurado ante mí, hoy día 5 de Diciembre de 1903, en la Ciudad de Manila, I. F.

(Firmado) "W. H. LAWRENCE,
[SELLO.] *Notario Publico.*

"Suyo nombramiento termina el 1. o de Enero de 1905.
"(Es traducción de su original en inglés.)"

Después de entregado al demandado, en debida forma, el emplazamiento y copia de la demanda, compareció el demandado por medio del Honorable Gregorio Araneta, Procurador de las Islas Filipinas, y, en el mes de Enero de 1904, presentó la siguiente contestación:

5 (Encabezamiento Juzgado y Causa.)

"Como contestación á la demanda de la demandante, el demandado expone:

"1. No tiene informes suficientes para formar una creencia con respecto á la verdad de las alegaciones contenidas en el párrafo 1. o de la demanda, y, por tanto, niega las mismas y cada una de ellas.

"2. Niega todas y cada una de las alegaciones contenidas en los párrafos 2, 3, 4 y 5 de la demanda, salvo en cuanto queden las mismas admitidas á continuación en la presente contestación.

"3. El demandado es actualmente, y desde una época que antecede de mucho al día 17 de Noviembre de 1902 ha sido contínuamente, un oficial comisionado de la Marina de los Estados Unidos, y en dicha fecha, por órden de sus Jefes en dicha Marina, ha sido constituido, y desde entonces ha venido siendo, el Comandante del Arsenal de la Marina de los Estados Unidos á Cavite, parte de cuyo Arsenal estaba entonces, y está actualmente situada en aquella porción de Punta-Sangley á que se refiere la demanda, y, en su concepto de tal Comandante, se ha negado á rendir, ó á permitir el que deslindase ó de otro modo invadiese la demandante dicha porción de la mencionada Punta.

"4. Y, por vía de defensa especial, expone el demandado que dicha porción de la mencionada Punta es terreno hecho que ha venido agregándose á la línea de la antigua playa mediante acrecentamientos y depósitos causados por la acción de la mar, y es parte del dominio público del Gobierno.

"5. Y, por vía de defensa separada especial, expone el demandado

que se queda él en posesión de dicha porción de la mencionada
6 Punta solamente en su concepto oficial y bajo la autoridad de los Estados Unidos, y que los Estados Unidos y su antecesora en la posesión, á saber, España, por medio de sus Oficiales autorizados han quedado en la posesión aparente y no interrumpida de dicha porción de la mencionada Punta, á medida que ha venido la misma creciendo por efectos de los acrecentamientos y depositos de la mar, por más de treinta y seis años con anterioridad á la institución de la presente acción.

"6. Y, por otra defensa separada especial expone el demandado que el motivo de acción expuesto en la demanda de la demandante no surgió dentro del espacio de treinta y seis años con anterioridad á la presentación de la demanda.

"Por lo Tanto, suplica el demandado que se dicte sentencia contra la demandante desestimando y sobreseyendo la demanda, y por las costas de este judicio, y por tal otro alivio adicional pudiere el Juzgado estimar justo.

"(Firmado) GREGORIO ARANETA,
Fiscal Interino, Abogado del Demandado."

En 12 de Marzo de 1904, día señalado para la vista de la presente Causa, se constituyeron las partes en el Juzgado, y, después de habidas varias audiencias, concluyóse la vista el día 15 de Abril de 1904 Habiendo la Sociedad demandante terminado la presentación de sus pruebas, el demandado ofreció, en concepto de prueba suya, la escritura señalada "Documento Anexo I," opia de la cual se hace parte de esta pieza de excepciones. El Abogado de la Sociedad demandante interpuso la siguiente objeción: "Me opongo á que quede admitido el documento de que se trata, basándose la objeción en que no
7 tiene dicho documento relación alguna con la cuestión debatida por los motivos siguientes: que queda admitido que el terreno objeto del litigio es aluvial. Admito que el documento demuestra una admisión al efecto de que los edificios del Gobierno estaban situados en cierto terreno determinado, pero declaro que no consta que el terreno en que estaban situados estos edificios es el mismo terreno que se halla actualmente en litigio. Me opongo á que sean introducidas pruebas al objeto de demostrar la existencia en el gobierno de un título por prescripción ó mediante posesión por parte del gobierno, contra la Sociedad Ker y Compañía, la cual es tercero que ha comprado un título inscrito contra el cual no puede ahora el gobierno alegar un título no inscrito."

Fué desestimada esta objeción por parte de la demandante, y admitióse el documento presentado, el cual fué señalado "Documento Anexo I (uno) del demandado," á cuya resolución la demandante se excepcionó.

Subsiguientemente el demandado llamó en concepto de testigo á José Iturralde, cuya declaración se lee en parte como sigue:

"Pregunta. Sírvase V. mirar esta copia certificada de cierto instrumento notarial que la pongo ahora en manos, y que se supone contener copia de una carta fechada en 21 de Marzo de 1884 y firmada

por José Iturralde, y diga si es Vd. la persona quien firmó equella carta.

"Respuesta. Sí, Señor, soy yo equella misma persona.

"P. En que concepto, con relación á los dueños del terreno referido en dicha carta, escribió V. la misma?

"R. Por parte de los dueños del terreno.

"P. Los dueños del terreno, le autorizaron á Vd. á obrar
8 por parte de ellos en este asunto?

"R. Sí señor, verbalmente.

"P. Á la carta á que se refieren las precedentes preguntas y respuestas iba unido, según su contenido, un plano del terreno de Cañacao—Sírvase Vd. mirar ese plano que le pongo ahora en manos y decir si fué ese el plano que acompañó su dicha carta.

"R. No me recuerdo. No me acuerdo haber visto aquel plano. Puede ser que los Señores Pelle Hubbell lo firmaron, pero yo no me recuerdo de haberlo firmado. Escribí la carta de acuerdo con mis instrucciones; puede ser que este plano la acompañaba, pero no me lo recuerdo.

"El Sr. SUTRO: Queda admitido por la representación de la demandante que la firma certificada que aparece en el plano referido es la firma de un Notario Miguel Torres.

"El Sr. GOLDSBOROUGH: El certificado y el plano se ofrecen en pruebas por la representación del demandado, pidiendo esta que queden señalados respectivamente Exhibits 6 y 7, siendo este el plano (presentando el plano en cuestión) que tiene por objeto el demostrar los límites de la Punta Sangley con relación al Varadero.

"El Sr. SUTRO: Me opongo á la introducción de la carte por ser la misma incompetente. Con arreglo á los Códigos el que obra por virtud de autorización verbal no puede obligar al dueño de terrenos. En cuanto al plano, aún si fuese presentado por el Sr. Iturralde, no consta ni que es exacto ni quien lo haya hecho. Por fin, el mismo testigo no puede decir que este es el mismo plano, y no consta de
donde se derivaron los datos con arreglo á los cuales fueron
9 fijadas las líneas de 1822, 1840, y 1880, y aparece por el plano mismo que no es sino un esbozo de mapa. Es uno de los
se*
planos cuya exactitud no es halla la representación del demandado
e*
dispuesta á admitir. Esta plano no es sino un facsímile del plano ya ofrecido y á que he interpuesto ya objeción, y á este plano quedan aplicables las idénticas objeciones hechas en contra del primero.

"El Sr. JUEZ: Queda admitido el Exhibit Número 6.

"El Sr. SUTRO: Excepción.

"El Sr. JUEZ: Resolución reservada en cuanto al plano señalado Núm. 7 para identificación.

El demandado ofreció en pruebas un documento señalado "Exhibit 8" del demandado, copia del cual se hace parte de esta pieza de excepciones. Á esta oferta interpuso la demandante objeción basada en el motivo de que no era procedente la prueba ofrecida;

[* In pencil in copy.]

que consistió en un informe hecho por el Almirante Montojo, representante que fué éste del Gobierno español, el antecesor en interés del demandado; que dicho informe contuvo la opinión del Almirante Montojo. La resolución del Juzgado fué reservada, pero subsiguientemente quedó admitido en pruebas dicho documento "Exhibit 8", y la demandante se excepcionó en debida forma á su introducción.

El demandado ofreció en pruebas un documento señalado "Exhibit 9", copia del cual se hace parte de esta pieza de excepciones. Á la introducción de este documento interpuso la demandante objeción basada en el motivo de que no era el mismo pertinente y que no era ni procedente ni relacionado con los puntos debatidos en la causa, alegándose al apoyo de la objeción que dicho "Exhibit 9" se refiere á terrenos distintos de los que hacen el objeto de esta acción, que el título alegado por el demandado no está inscrito y no se le quede ofrecer en oposición al título inscrito de la demandante, y que contiene dicho Exhibit una manifestación hecha por el mismo demandado en su propio interés. La resolución del Juzgado fué reservada; subsiguientemente quedó admitido en prueba dicho documento, interponiendo la demandante una excepción en debida forma para admisión del mismo.

Eusebio Guinto, habiendo sido llamado como testigo por parte del demandado, declaró en parte como sigue:

"Llamamos Cañacao la parte desde el corral hasta la extremidad del Hospital; eso es lo que llamamos Cañacao; desde aquella extremidad hasta la extremidad arriba llamamos Varadero, desde la última extremidad del Hospital—donde está actualmente el Hospital—hasta llegar al pantalan junto al varadero.

"El Sr. ARANETA: P. Quien estaba ocupando estos puntos llamados Cañacao y Varadero?"

Á esta pregunta interpuso la demandante objeción basada en el motivo de que pedía una conclusión ú opinión del testigo.

La objeción fué desestimada y una excepción notada por la demandante.

"Resquesta. La Marina la ocupaba todo.

"Señor ARANETA: Y los jornaleros á quienes ha referido Vd. eran empleados de la Marina?

"R. Sí, Señor.

"P. Cuyas personas eran las únicas que iban ocupando estos sitios?

Á esta pregunta interpuso la demandante objeción basada en el motivo de que era la misma sumamente sugestiva.

Objeción desestimada y excepción notada.

Subsiguientemente al mismo testigo le preguntó el Sr. Araneta: "De modo que, si le entiendo bién, la puerta formando la entrada al terreno ocupado por la Marina en Cañacao estaba en el mismo sitio en 1859 que está actualmente hoy día, es verdad?"

Á esta pregunta interpuso la demandante objeción basada en el motivo de que era la misma sumamente sugestiva y de que asumía un hecho no establecido por las pruebas.

La objeción fué desestimada y la demandante se excepcionó.

"R. La colocación es la misma.

"A. L. Parsons fué llamado como testigo de parte del demandado y sometió el plano "Exhibit Núm. 3" del demandado redactado por el testigo y demostrando Punta Sangley tal como existía á la época de la vista, en Marzo, 1904. Á este testigo le preguntó la representación del demandado: "Que es lo que queda indicado en este plano, "Exhibit Núm. 3," por la traza en la cual aparecen las palabras "New Coal Plant"?

Interpso la demandante objeción á esta pregunta por ser la misma sin importancia ni relación con la causa, porque todo lo que se haya hecho en la Punta desde 1901 y la fecha de la presentación de la demanda no es ni procedente ni de importancia alguna con respecto á la causa actual.

La objeción fué desestimada y la demandante se excepcionó.

"R. El establecimiento para el depósito de carbón y que se iba construyendo en la ciudad de Nueva York para el gobierno de los Estados Unidos."

La misma objeción fué hecha é idéntica, resolución dictada y excepción notada respecto de preguntas subsiguientes sonsacando
12 la descripción de los depósitos de carbón, de los edificios provisorios levantados por el contratista con objeto de la construcción de una estación carbonera para la Marina, de los muelles destinados al objeto de la carga y descarga de carbón, del nuevo Hospital que se está actualmente erigiendo por el gobierno de los Estados Unidos para servir de hospital naval, de un edificio de que se sirve en concepto de cuarto de guardia y para el almacenaje de artículos y efectos pertenecientes á la Marina, y de un sitio utilizado actualmente para el tiro al blanco por los marineros y los soldados de la infantería de marina de los Estados Unidos.

El demandado ofreció en pruebas copia certificada de un aviso dado por los Sres. Peele y Robinson de su intención de presentar una solicitud pidiendo concesión para la construcción de un Varadero en la Punta Sangley, publicado dicho aviso en la Gaceta de Manila de fecha 26 de Septiembre de 1881. Este documento iba señalado "Exhibit Núm. 4 del demandado," y copia del mismo se le hace parte de esta pieza de excepciones.

Interpuso la demandante objeción á esta oferta por no tener la misma relación ni importancia ni competencia cualquiera con respecto á la cuestión debatida, arguyendo que se refiere el documento únicamente á un terreno no incluido en los que hacen el objeto de este litigio, y que en contra del título inscrito del demandante no queda admisible prueba de un título derivado de la prescripción y no inscrito.

Fué desestimada esta objeción y el "Exhibit Núm. 4 del Demandado" fué recibido en pruebas, á cuya resolución se excepcionó la demandante.

13 El demandado ofreció en pruebas una copia certificada de la concesión para el Varadero, publicada en la Gaceta de Manila en 20 de Septiembre de 1884, señalda "Exhibit Núm. 5 del demandado." Copia de este Exhibit se hace parte de esta pieza de excepciones.

Interpuso la demandante objeción á esta oferta, motivándola en

que no tiene dicho documento ni relación, ni importancia, ni competencia con respecto al asunto debatido; que no tiende á establecer ningún punto controvertido en la causa; que consiste en un auto practicado en el curso de procedimientos en los cuales no era parte interesada Doña María Bartola Franco, la antecesora en interés á la demandante; que no afecta sino á un terreno fuera de los límites del terreno sobre que versa el presente litigio; que tuvo por objeto el establecer un título, por prescripción en el gobierno, y, no quedando inscrito dicho título, no procede introducir pruebas en apoyo de ello contra el título de la demandante debidamente inscrito y comprado de buena fé; que dicho exhibit contiene una manifestación por parte del gobierno hecha por este al objeto de apoyar sus propios intereses, la cual no se la puede admitir en pruebas contra el título de la demandante.

Fué desestimada la objeción y el "Exhibit Núm. 5 del demandado" fué recibido en pruebas, á cuya resolución se excepcionó la demandate.

El testigo, VICTOR BORROMEO, llamado por parte del demandado, fué preguntado por éste:

"Conoce Vd. el sitio ocupado actualmente por el Varadero?

"R. Sí.

"P. Desde la puerta hasta llegar al Varadero, puede Vd. decirme que edificios hubo alla?

14 La demandante interpuso objeción á esta pregunta por ser la misma sugestiva, incompetente, y no relacionada con la cuestión debatida, pués al testigo se le pregunta acerca de un pedazo de terreno que no es el terreno, ni parte cualquiera del mismo, sobre el cual versa el litigio; que la posesión por el gobierno de este terreno no puede tender á establecer ningún punto controvertido en la causa; que no compete al gobierno establecer un título por prescripción en contra del título de la demandante inscrito y adquirido de buena fé, y que no procede introducir pruebas al objeto de establecer la posesión por parte del gobierno hasta que no se haya cancelado y anulado la inscripción de la posesión y del título de la demandante.

La objeción fué desestimada. Excepcionóse la demandante.

"R. Empezando con la Oficina del Comandante—donde estaba el comandante—vino después el cuartel de la infantería de marina; entonces la casa del oficial pagador y una casa de nipa en donde hubo depositado carbón. Hubo también otras casas de nipa en donde se depositaba madera; y por fin el pantalán donde se descargaba el carbón. No hay más."

Este testigo fué preguntado extensamente, refiriéndose todas las preguntas al terreno situado entre la puerta del hospital y el varadero, cuyo terreno queda admitido que no es el terreno sobre el cual versa el litigio actual.

Á todas estas preguntas interpuso la demandante la misma objeción. La misma resolución fué dictada, y notóse la excepción de la demandante.

El demandado ofreció en pruebas las hojas 169 5 170 de la His-

toria Geográfica, Geológica, y Estadística de Filipinas, por Agustin de la Cavada, publicada en Manila en 1878, habiéndose sacado dicho libro de la biblioteca de la Oficina de los Archivos Insulares. Copia de dichas hojas, señalada "Exhibit Núm. del demandado," está hecha parte de esta pieza de excepciones.

Interpuso la demandante objeción á esta oferta por no tener dicho exhibit ni competencia ni importancia ni relación cualquiera con respecto á la cuestión debatida, no estando autenticadas dichas hojas y no constituyendo su contenido sino prueba de mera referencia, siendo el autor del libro, á la fecha de su publicación, un oficial del gobierno español, el antecesor en interés del demandado.

En aquel momento quedó reservada la resolución del Juzgado, pero después fué admitido dicho exhibit en pruebas, á cuya admisión se excepcionó la demandante.

Enrique Barrera, testigo llamado por la demandante para contradecir las pruebas del demandado, fué preguntado en parte como sigue:

El testigo dice conocer á Carlos de las Heras, quien, en tiempo de la soberanía española, era jefe de ingenieros militares, y quien había hablado con el testigo acerca de la construcción de la fortaleza á la Punta Sangley.

"P. Que le dijo á Vd. respecto de esa fortaleza?"

Interpuso el demandado objeción á este pregunta por ser la misma incompetente, porque su objeto era consignar en pruebas una manifestación hecha por un tercero en una conversación habida entre el testigo y otra persona, á cuya conversación no estuvo el demandado presente. Retiróse la pregunta.

"P. Sabe Vd. quien construyó la fortaleza, que ingeniero construyó la fortaleza á la Punta Sangley?

"R. Tuviera que contestar según lo que he oido decir.

"P. Le dijo á Vd. el Sr. Carlos de las Heras quien había construido la fortaleza ó superentendido su construcción?"

Interpuso el demandado objeción á esta pregunta por ser la misma inadmisible en razón á que procuraba hacer decir al testigo cosas que no había éste sino oido decir. Arguyó el demandado al efecto de que el gobierno no es parte en esta causa, y que una manifestación hecha por un oficial cualquiera del gobierno, aún cuando haya fallecido, á no ser que caiga dentro de una disposición especial del Código, no es admisible contra el demandado; que el único modo de introducir contra el demandado una manifestación hecha por este oficial español sería el de llamar á aquel oficial como testigo.

"Sr. JUEZ: Vive aún el Sr. Heras?

"R. Sí, Señor, está en España."

La objeción del demandado fué sostenida. Á esta resolución se excepcionó la demandante y ofreció comprobar por medio del testigo que Carlos de las Heras, ingeniero militar de las fuerzas militares españolas en el año 1884 y los siguientes años, había dicho al testigo que la fortaleza construida en la Punta Sangley la había erigido el ramo militar del Gobierno español y que no quedaba colocada allá sino interinamente y que fué él quien la había colocado allá. La última pregunta, que el Juzgado había mandado tachar, fué

hecha parte de esta oferta. Sostuvo el Juzgado la objeción interpuesta contra esta oferta de la demandante, y ésta se excepcionó.

Dióse por terminada la vista en 14 de Septiembre de 1904, y fué dictada y sentada la siguiente sentencia á favor del demandado:

17 (Encabezamiento Juzgado Causa.)

"Sentencia.

"La presente Causa versa sobre la lengua de tierra situada en la Bahía de Manila y ensenada de Cañacao, comprensió del antiguo pueblo de San Roque, Provincia de Cavite, y conocida con el nombre de Punta Sangley, cuya propiedad pretenden los demandantes reivindicar del demandado, que lo posee actualmente con exclusion de aquellos; fundándose en que son dueños absolutos con derecho á la posesión del terreno descrito en la demanda, y que el demandado, en 17 de Noviembre de 1902, contra la voluntad y consentimiento de ellos, y sin derecho de hacerlo, tomó posesión de dicho terreno, causándoles por ellos daños en una suma de más de mil quinientos dollars, moneda de los Estados Unidos, mensualmente, desde el 17 de Noviembre de 1902.

"El demandado niega todas las alegaciones de la demanda, y como defensa especial establece: 1.o Que el terreno reclamado ha sido formado por los depósitos y acrecentamientos causados por la acción del mar, y es parte del dominio público; 2.o que el motivo de la acción de los demandantes no se ha suscitado durante los treinta y seis años anteriores á la fecha de la demanda; y 3.o que retiene la posesión del terreno en su capacidad oficial y obrando bajo la autoridad del Gobierno de los Estados Unidos.

"Los demandantes presentaron en apoyo de su acción el Exhibit 'J,' que es documento fechado en 16 de Agosto de 1901 que se dice ser de transferencia de dominio de aquella parte de Punta Sangley comprendida entre el Varadero y el extremo de la Punta, otorgado por la familia Rodriguez á favor de Ker y Compañia. En él se menciona
que la familia Rodriguez eran entonces los dueños de una
18 Hacienda llamada 'San Isidro Labrador' ó 'Estanzuela,' con inclusión de todas sus pertenencias y de los terrenos conocidos como Punta Sangley ó Cañacao, siendo los linderos de dicha Hacienda por el Norte la Bahía de Manila; por el Sur, el Istmo de Darahican y las tierras de Lecton de la propiedad de D. José Basa; por el Este, la Ensenada de Cañacao, un estero del pueblo de S. Roque, y la Ensenada de Bacoor; por el Oeste, la Bahía de Manila; que dicha hacienda había sido adquirida por su antepasada, María Bortola de los Iturralde por virtud de un documento otorgado en el pueblo de Binondo el 13 de Julio de 1852 (Exhibit 'E' de los demandantes); y que la venta á Ker y Compañía se hizo bajo la condición de que 'los vendedores no serían responsables de la evicción y saneamiento de aquella parte de terreno que está ocupado por un a batería de costas; 'admitiendo los compradores la transferencia sujeta á los resultados de la ocupación actual por las fuerzas del

Gobierno Americano de dicha batería, así como sujeta á las servidumbres que hayan sido adquiridas allí bajo las leyes españolas ó bajo las que ahora están en vigor.

"En corroboración de esta prueba fueron presentados los Exhibits 'D,' 'E,' 'F,' 'G,' 'H,' 'I,' 'K,' 'L,' 'LL,' y 'M.' El contenido de estos documentos se halla historiado en el Exhibit 'K,' que es una certificación librada por el Registrador de la Propiedad de Cavite, en la que hace constar los documentos que le fueron presentados para la inscripción de la Hacienda de S. Isidro Labrador ó Estanzuela, á saber:

1. Primera copia de la escritura otorgada el día 29 de Agosto de 1804 por D. Juan Pablo Infante, Doña Ana María Valez de Escalante, y D. Felix Ruiz, á favor de Don Juan Antonio
19 Iturralde, ante el Escribano Real y Público de Manila, D. Pedro Alejandrino Flores, librada dicha primera copia el día 15 de Julio de 1852 por el Escribano D. Pedro Forras; 2.o Primera copia de la escritura de compra-venta otorgada por Doña Dolores, Don Joaquin, y Doña Agapita Iturralde á favor de Doña Bartola Franco el día 13 de Julio de 1852 ante el Escribano Público de Binondo, D. Doroteo Martin de Angeles, y expedida por el mismo Notario el día del otorgamiento; 3.o Testimonio de las operaciones de medición practicada por el Juez de Primera Instancia de Cavite en virtud de auto de la Real Audiencia de Manila y expedido dicho testimonio por el Escribano, D. Marcelino Jesús Amador, el 7 de Noviembre de 1854; 4.o Inventario y partición de los bienes de Doña María Bartola Franco, viuda de D. José Rodriguez Vela, verificadas entre sus tres hijos y herederos, Doña Carmen, D. Enrique y Doña Josefa Rodriguez y Franco, protocolizadas el día 29 de Abril de 1884 en el Juzgado de Cavite, previa ratificación de los tres herederos con consentimiento la primera de su esposo, Don Jacinto Belando y Paz; 5.o Testimonio librado por D. Estanislao Hernandez, Escribano habilitado del Juzgado de Cavite, de la sentencia dictada el día 28 de Noviembre de 1856 por D. Manuel Asensi, Juez de Primera Instancia de Cavite, y Real Auto de la Audiencia de Manila de 9 de Junio de 1857, relativos á los autos entre D. José Rodriguez Vela, á nombre de su esposa Doña Bartola Franco, y José Ferandez, en representación de Julian Francisco y sus consortes, sobre propiedad del sitio llamado Punta Sangley, del pueblo de San Roque; 6.o Sumaria información practicada á instancia de D. Enrique, Doña Carmen y Doña Josefa Rodriguez, y aprobada en virtud de auto dictado el día 31 de Mayo de
20 1883 por D. Adolfo García de Castro, Juez de Primera Instancia de Cavite.

"El demandado se opuso á la presentación de estos documentos, alegando que no se refiere al terreno objeto de la demanda; pero el Juzgado los admitió para determinar después el valor que pueden tener en la causa, ya que por su carácter de documentos públicos y auténticos queden ser introducidos como prueba (Art. 299 del Código de Procedimiento Civil).

"Del examen de tales documentos resulta que se refiere á la Hacienda de S. Isidro Labrador y Punta Sangley tal como queda

deslindada en 1811, y demarcada por segunda vez en 1856. La sentencia de 1856 (Exhibit 'L') se refiere á los terrenos de la Punta Sangley comprendidos á la medición de 1811, como lo aseguran los agrimensores que rectificaron aquella medición en el año 1856; y así puede verse prácticamente en el Exhibit 'N' de los demandantes. La misma información á perpetuam (Exhibit 'L') se contrae á la Hacienda de Estanzuela y Cañacao ó Punta Sangley, según los títulos y planos que de ella poseía la finada Doña Bartola Franco Rodriguez Vela.

"El valor, pués, de dichos documentos, con respecto á la cuestión que se ventila es secundario, pués solo tienden á establecer que los vendedores tienen títulos á la Hacienda de Estanzuela tal como quedó deslindada en 1811, deslinde que fué rectificado en 1856.

"Sobre el origen y formación del terreno de autos, los demandantes admiten que ha sido resultado de alteramientos ocasionados por el mar, como alega el demandado en el párrafo 4.o de su contestación. Los testigos del demandado que han declarado sobre este extremo, y principalmente el Exhibit N.o 10 del mismo, demuestran
que la Punta Sangley ha venido avanzando en extensión
21 desde 1811 hasta el presente, apareciendo cierto número de
metros de terreno de año en año. Dicho Exhibit N.o 10 as parte de una historia Geográfica, Geológica, y Estadística de Filipinas, y ha sido admitido en juicio de acuerdo con el art. 320 del Código de Procedimiento Civil.

"Sobre la situación topográfica del terreno se han presentado por una y otra parte varios planos, siendo exactos y admitidos por los litigantes el Exhibit N.o 2 del demandado y 'N' de los demandantes.

"El plano N.o 2 ha sido levantado por el Ingeniero Civil de la Marina de los EE. UU., Mr. Archibald Livingstone Parsons, con vista de las actas de las medicones de 1811 y 1856 que aparecen en los Exhibits 'K' y 'N' de los demandantes.

"En materia de hechos ha sido objeto de discusiones y pruebas documentales y testificales la ocupación del terreno litigioso, alegando los demandantes que en Diciembre de 1900 y Enero y Febrero de 1901 se dedicaron á limpiar de malezas el terreno de autos, la cual obra quedós in terminar y hubo de ser abandonada á causa de haberlos arrojado del terreno la ormada de los EE. UU. destacada en Cavite; que los nombrados Alfaro, Aquino, y Ferrer (páginas 142, 150, y 170 respectivamente de los autos) pagaban canón á los dueños de la Hacienda Estanzuela por el terreno que ocupaban en la Punta Sangley en los años 1877 el primero y 1893 el tercero; que el terreno ocupado por el demandado es solamente una pequeña porción del terreno que se reclama y que ciertos pescadores tuvieron en la misma Punta cabañas donde descansaban durante el día y guardaban sus aparatos de pesca, habiendo pagado canón uno de estos
pescadores á los causantes de los demandantes por el terreno
22 que ocupaba su cabaña desde 1886 á 1896.

"Por su parte, el demandado presentó varios testigos que declararon sobre la existencia de varios edificios de la Marina levantados en la Punta Sangley y en el terreno denominado Cañacao á raiz de la fundación de los establecimientos llamados de Cañacao, y

que la Marina del Gobierno español primero, y la del gobierno americano después, ha venido ocupando la Punta Sangley desde la entrada de Cañacao. Presentó además el demandado los Exhibits Nos. 1, 5 y 8.

"El Exhibit No. 1 del demandado, fechado en 6 de Octubre de 1881, es una oposición presentado por María Bartola Franco á la concesión del establecimiento de un Varadero en la Punta Sangley, en la que dicha María Bartola Franco dice: 'Cuando compre de los anteriores dueños la Hacienda de San Isidro Labrador ó Estanzuela, con inslución de la Punta Sangley ó Cañacao, hallábase ya la Marina establecida, aunque entonces no disfrutaba toda la extensión del terreno que abora.'

"El Exhibit No. 5 fecha 23 de Julio de 1883 es una concesión para la construcción del Varadero de Punta Sangley en el sitio que en la actualidad ocupa el Varadero de Manila, publicada en la Gaceta de Manila de 20 de Septiembre de 1884, la cual contenía las siguientes prescripciones: 'No se usará el terreno cedido para ningún otro objeto que para el Varadero y sus dependencias, el cual revertará á la Marina tan pronto cese de funcionar el Varadero. . . . Toda comunicación con el varadero se verificará exclusivamente por mar, y se permitirá la comunicación por tierra sólo en casos de reconocida necesidad, previo permiso que con anticipación se obtenga de las autoridades navales. . . . El período de duración
23 de esta concesión será de noventa y nueve años contados desde la fecha de su otorgación, á la terminación de los cuales el varadero y todas sus dependencias reverterán al gobierno.'

"El Exhibit No. 8, fechado en 6 de Abril de 1873, es un informe oficial de D. José Montojo, oficial de la Armada Española y entonces comandante general del arsenal de Cavite, ya difunto, en el cual dice lo siguiente: 'El 19 de Septiembre de 1881 Doña María Bartola Franco, vecina entonces de Cavite, en la actualidad ya difunta, presentó un escrito de la comandancia general del apostadero, explicando que no era su objeto reclamar los terrenos en los que la Marina tiene edificados sus varios camarines para depósito de carbón y un hospital y en los que recientemente construyeron cuarteles para la infantería de Marina, y en donde existían también varios otros edificios de la Marina, pero sabiendo que una empresa particular se proponía establecer allí un varadero, suplicaba se la declarara propietari del parte del terreno ocupado por la Marina; cuyo escrito, de acuerdo con la opinión del último Auditor de Marina, fué desestimado por decreto de 29 de Septiembre de 1881. . . . Los derechos de la Marina sobre los terrenos en donde estaban situados sus edificios, los cuales eran necesarios para los varios servicios y necesidades del gobierno, emanaban indudablemente de la propia naturaleza y de la situación topográfica del terreno, situado al borde del mar, cuyos derechos las leyes generales del país concernientes á la propiedad de las aguas, sus riveras, playas, zonas marítimas de guerra, etc., etc., los definen y regulan.'

"Los demandantes se opusieron á la admisión de estos Exhibits por impertinente en cuanto al número 1, y, respecto á los números

5 y 8, porque han sido redactados por oficiales en interés del
24 demandado, pero el Juzgado los admitió bajo las disposiciones del art. 328 del Código de Procedimiento Civil.

"Los demandantes llaman la atención del Juzgado sobre el hecho de que muchos de los testigos del demandado han sido, y algunos siguen aún siendo empleados del Arsenal de Cavite. Es difícil poder presentar testigos mejor informados que aquellos que han estado trabajando en el terreno desde su juventud; y, si bién la circunstancia de haber sido ó ser empleados puede influir en los demandantes sospecha de parcialidad, tal sospecha no es motivo legal para declararles incapaces de decir la verdad, principalmente cuando como ocurre en el presente caso, no se ha demostrado la falsedad de sus declaraciones. El Art. 383 del Código de Procedimientos Civiles vigente que enumera los casos de incapacidad de los testigos, no señala el motivo alegado por los demandantes. Pués bién, en opinión del Juzgado, el testimonio de los testigos del demandado y los Exhibits citados son bastante á establecer como cierto que dicho demandado y sus antecesores en el fenecido gobierno español empezaron á poseer la Punta Sangley desde antes del año 1852 y continuaron poseyendo la misma Punta á medida que iba creciendo por la acción del mar hasta el presente.

"Y esta deducción del Juzgado sobre la posesión del demandado se halla también corroborada con los Exhibits Núm. 4 del demandado y 'CC' de los demandantes.

"El Exhibit del demandado fechado en 22 de Septiembre de 1881 es un aviso de haberse presentado una solicitud pidiendo la concesión para construir un Varadero en Punta Sangley, en el sitio en donde en la actaulidad está el Varadero de Manila, que se publicó en la Gaceta de Manila en 26 de Septiembre de 1881, de
25 acuerdo con la Ley de Aguas de 1866 (á pagina 3), en cuyo aviso se decía que dicho terreno 'está en la actualidad dedicado al servicio de la Marina, y está situado entre los edificios del hospital y las ruinas del antiguo taller de maquinaria.'

"El Exhibit 'CC' de los demandantes, fechado en 22 de Marzo de 1884, es un documento en que la familia Rodriguez relevaban al peticionario de la concesión para el varadero de cuantas reclamaciones pudieran tener sobre el terreno del varadero, y en el mismo se decía: 'que ninguno excepto la Marina ó el gobierno que lo ocupa puede alegar ó pretender tener derecho á título alguno sobre dicho terreno,' y en el mismo documentos los vendedores se comprometían á proteger á los compradores contra toda reclamación, excepto la Marina ó el Gobierno, con respecto á los cuales no asumían obligación alguna.

"No es argumento en contra de la posesión del demandado el hecho de haber limpiado los demandantes el terreno de autos en los meses de Diciembre de 1900 y Enero y Febrero de 1901, porque no se pierde la posesión por la posesión adversa de tres meses solamente (Art. 460, 4.o del Código Civil).

"No es argumento en contra de la posesión del demandado el hecho relatado por los testigos de los demandantes de que aquel ocupa solamente una pequeña parte del terreno, porque, para poseer

una finca, no es menester ocuparla materialmente en toda su extensión, bastando el hecho de quedar sujeta aquella á la acción de la voluntad del que trate de adquirir su posesión como la indican los hechos ejecutados por el demandado (Art. 438 del Código Civil).

"No es argumento en contra de la posesión del demandado el hecho de haber pagado canón los llamados Alfaro, Aquino y
26 Ferrer á la familia de Rodriguez—1.o, porque los dos primeros se refieren á un terreno que está cerca del polvorín de Cañacao y situado fuera del terreno en cuestión; y 2.o, porque el supuesto arrendatario Ferrer, si ocupó parte de la orilla de la playa, fué más bién por el consentimiento de las Autoridades de la Marina que por virtud del contrato, como el que se dice arrendanor no salió á la defensa de aquel cuando fué despedido del terreno por dichos Autoridades.

"No es argumento en contra de la posesión del demandado la fama ó reputación común introducida como prueba por los demandantes, porque la prueba que tenga por base el conocimiento general no es admisible para probar la propiedad ó posesión ó para contradecir prueba en autos, y, además, porque, si dicha reputación se ha introducido para establecer lindero, como afirman los demandantes (página 40 de su informe final), no son los linderos el objeto de la cuestión, sino la posesión del terreno comprendido entre el varadero y el extremo norte de la Punta Sangley.

"No es argumento en contra de la posesión del demandado la entrada de pescadores en el terreno en cuestión y su estancia en la playa de la Punta Sangley dedicándose á la pesca, porque tales actos, lejos de ser constitutivos de posesión adversa, son consecuencia natural del uso legal de las aguas, playas y riveras del mar (ley tercera, título 28, de la partida tercera y art. 339 del Código Civil).

"Del resultado de las pruebas presentadas por ambas partes, y de las admisiones hechas por los demandantes en cuanto al hecho contenido en el párrafo 4.o de la contestación, el Juzgado deduce
27 y declara como probados en la presente causa los hechos siguientes:

"1.o. Que el terreno en cuestión ha sido formado por las accesiones y aterramientos ocasionados por el mar entre los años 1811 y la fecha de la presentación de la demanda (22 Diciembre 1903), apareciendo cierto número de metros de año en año deside entonces hasta el presente.

"2.o. Que el demandado en su capacidad oficial de comandante de la arsenal de los EE. UU. en Cavite, y sus antecesores en el fenecido Gobierno español, desde antes de 1852 han poseido en concepto de dueño á nombre del Gobierno el terreno denominado Cañacao hasta la Punta Sangley, menos la parte ocupada actualmente por el Varadero de Manila y han estado y siguen ocupando dicha Punta Sangley conforme esta iba avanzando hasta el presente, habiendo levantado allí los edificios detallados en el Exhibit Núm. 3 del demandado.

"3.o. Que los herederos de Doña Bartola Franco Rodriguez Vela, fundándose en los títulos que poseen de la Hacienda de San Isidro Labrador ó Estanzuela, vendieron el terreno en litigio, que se extiende

desde el sitio que hoy ocupa el Varadero hasta la Punta Sangley, á los demandantes, por Escritura Pública de 17 de Marzo de 1901, que fué escrita en el Registro de la Propiedad de Cavite en 23 de Mayo de 1901, en cuanto á las dos terceras partes del terreno vendido, y el 5 de Mayo de 1902 en cuanto á la otra tercera parte, consignándose en la escritura de traspaso que 'los vendedores no serían responsables de evicción y saneamiento de aquella parte de terreno que está ocupado por una batería de costa', y admitiendo los compradores la transferencia sujeta á los resultados de la ocupación actual
28 por las fuerzas del Gobierno Americano de dicha batería, así como sujeta á las servidumbres que hayan sido admitidas allí bajo las leyes españolas ó las que ahora estén en vigor.

"Cuestiones de Derecho.

"Las cuestiones de derecho que los litigantes someten á la resolución del Juzgado en la presente causa son las siguientes:

"1.a. Los terrenos formados por las accesiones y atteramientos del mar son de dominio público ó pertenecen á los dueños de terrenos adyacentes?

"2.a. Tienen los demandantes títulos bastantes en derecho para revindicar del demandado el terreno en litigio?

"I. La defensa establecida por el demandado en el párrafo 4.o de su contestación á la demanda ha suscitado la cuestión de si los dueños de terrenos colindantes con el mar tienen derecho á la accesión. Los demandantes alegan que les fué transferida la propiedad del terreno por los herederos de la familia Rodriguez en virtud de su derecho de accesión á cuanto se ha agregado á su terreno, como el de autos. Por otra parte, el demandado sostiene que el terreno formado por la acción de las aguas del mar es de dominio público.

"Como se vé, el derecho de accesión constituye el nervio de toda la controversia, ó, como dicen los demandantes (página 28 de su informe final), el punto de acrecentamiento es la cuestión vital en la causa actual y prácticamente la única cuestión.

"Puesto que las partes convienen que en dicho terreno se ha formado por aluvión entre los años 1811 y 1903, procede determinar ante todo la ley aplicable al caso. Conforme al Art. 16 del
29 Código Civil, la ley aplicable al caso es la Ley de Aguas de 1866, que especialmente regula las accesiones formadas en las riberas del mar, pero la Ley de Aguas de 1866 no comenzó á regir en Filipinas sino en Septiembre de 1871, y por tanto sólo es aplicable á aquella porción del terreno que haya venido formándose con posterioridad á la citada fecha. Preciso es, pués, acudir á las Leyes de Indias para ver la disposición aplicable á aquella otra porción del terreno formado antes de la vigencia de la Ley de Aguas, pero no habiendo nada prescrito acerca de la material en la "Recopilación de las leyes de los Reinos de las Indias," es de aplicar al caso el Código de las siete partidas, en virtud de lo dispuesto en el libro segundo de la citada Recopilación, Tit. 2.o, Ley segunda, que dice: 'Que se guarden las Leyes de Castilla en lo que no estuviere decidido por las de las Indias ordenamos y mandamos que en todos

los casos, negocios, pleitos en que no estuviere decidido ni declarado lo que se debe hacer por las leyes de esta Recopilación ó por cédula, provisiones ú ordenanzas dadas y no recovadas para las Indias, y las que por nuestra órden se despacharen, se guarden las leyes de nuestro reino de Castilla, conforme á la de Toro así en cuanto á la sustancia, resolución, y decisión de los casos, negocios, y pleitos, así como la forma y órden de sustanciar.'

Pués bién, el Código de las siete partidas, en la ley 26, Tit. 28 de la partida 2, 3, dispone que: 'todo cuanto los ríos tuellen á los omes poco á poco, de manera que no puede entender la cuantía dello, porque no lo llevan ayuntadamente, que lo ganan los Sres. de las heredades á quienes ayuntan, ó los otros á quienes tuellen, non han en ello que ver.'

30 "Esta Ley está consagrada por nuestro Código Civil á tratar del derecho de aluvión de los dueños ribereños con los ríos, y es el mismo derecho reconocido en todos los Códigos con más ó menos limitaciones.

"Los autores Amandi y Escriche, citados por los demandantes, al resolver la misma cuestión en sentido afirmativo, se fundan indudablemente en los principios que informan la citada ley de las partidas. El Juzgado, sin embargo, cree que la deducción no está rigorosamente sacada, por lo mismo que no hay completa semejanza de situación entre el dueño de torreno ribereño con los ríos y el de terrenos adyacentes al mar, y que el aluvión en las riberas del mar está sujeto á las leyes 3.a y 4.a del Tit. 28 de la partida 3.a.

"La ley 3.a es como sigue: Cuales son las cosas que comunmente pertenecen á todas las criaturas?—Las cosas que comunmente pertenecen á todas las criaturas que viven en este mundo son estas: el aire y las aguas de la lluvia é el mar é su ribera.

"La Ley 4.a del mismo Título y Partida dice: '. . . é todo aquel lugar es llamado ribera de la mar cuanto se cubre en agua della, cuanto más crece en todo el año, quier en invierno ó del verano.'

"Fijándonos en la definición de la ribera que dá la Ley 4.a, cuya definición concuerda con la de la playa que dá la Ley de Aguas, se vé que entre el terreno adyacente y el mar hay una porción de tierra baja que se llama ribera ó playa, lo que no ocurre en los terrenos ribereños con los ríos. Bajo este supuesto, el Juzgado cree

31 que la playa es susceptible de accesión y si es verdad que lo accesorio sigue á lo principal, siendo la playa del dominio público, conforme á la Ley 3.a, tienen que serlo forzosamente los aterramientos que á ella se agregan. En este criterio se inspira Gutierrez cuando, en sus estudios fundamentales del derecho civil español, Tít. 2, pág. 92 á 93, comentando el artículo 2.o de la Ley de Puertos de 1880, dice: 'Por el principio de que lo accesorio sigue á lo principal se declara con rigurosa lógica en la disposición transcrita que la accesión á una playa se hace de dominio público. Los terrenos ganados al mar pasan á ser propiedad del Estado. Y si éste los enagenase, los dueños de los terrenos colindantes tendrán derecho de tanteo.'

"La opinión del Juzgado se apoya en las sentencias del Tribunal

Supremo de España de 30 de Abril y 10 de Mayo de 1863, interpretativas de dichas Leyes. Según estas sentencias, el Gobierno puede dar en arrendamiento ó enfiteusis los terrenos comprendidos en la playa ó ribera del mar, y otorgar concesiones de los terrenos ganados al mar, determinando al efecto reglas especiales que dan y crean derechos de posesión y aprovechamiento exclusivo.

"Corrobora también la opinión del Juzgado la decisión dictada en el asunto de Mrs. Catharine Zellar, Widow, *vs.* Southern Yacht Club, 34 La. Ann. 837. La Corte inferior sostuvo la excepción del demandado de que no hay derecho de propiedad en la accesión ó atterramiento formado en la ribera del lago Pontchartrain, por lo mismo que dicho Lago es un brazo del mar. La Corte Suprema de Luisiana confirmó la sentencia apelada, entre otras razones por las siguientes:

'Que el único derecho reconocido á los acrecentamientos como
32 propiedad bajo nuestra Ley se refiere á los formados en los ríos y arroyos, y que no hay reconocimiento alguno de cualquier derecho de propiedad en ellos cuando están formados en las riberas de lagos, bahías, brazos de mar, ú otras grandes masas de agua, y que los modos ó maneras de adquirir la propiedad en tales casos están limitados á los expresamente prescritos por la Ley y no pueden ser extendidos por implicación."

"Con respecto al acrecentamiento formado desde 1871, la ley vigente en Filipinas es la Ley de Aguas de 1866. Con arreglo á esta Ley, deben los dueños de terrenos adyacentes al mar gozar del derecho de aluvión? Se hacen ellos dueños del acrecentamiento solo por el hecho de haberse este agregado á su heredad?

"El Juzgado opina por la negativa, pero semejantes dueños pueden obtener del Gobierno concesión de tal acrecentamiento bajo las condiciones establecidas en la misma Ley.

"Según el art. 4.o de esta Ley, 'son de dominio público los terrenos que se unen á las playas por accesiones y aterramientos que ocasione el mar. Cuando ya no los bañen las aguas del mar, ni sean necesarios para el objeto de utilidad pública, ni para el establecimiento de especiales industrias, ni para el servicio de vigilancia, el Gobierno los declarará propiedad de los dueños de las fincas colindantes en aumento de ellas.' Analizando los demandantes el sentido y alcance de este artículo, deducen del inciso segundo que es deber del Gobierno el *confirmar el título que ya poseen tales dueños.* El Juzgado no participa de esta opinión. Dicho inciso 2.o establece las condiciones bajo las cuales debe hacerse por el Gobierno la concesión á los particulares de los acrecentamientos formados por el mar. Estas condiciones son: 1.a, que no los bañen las aguas del mar, que no sean necesarios para el objeto de utilidad pública, ni para el estab-
33 lecimiento de especiales industrias, ni para el servicio de vigilancia; y, 2.a, declaración por el Gobierno á favor de las fincas colindantes.

"Y nótese que esta disposición de la Ley parte de la presunción de que tales acrecentamientos son necesarios para los objetos de utilidad pública, ó para el establecimiento de especiales industrias, ó para el servicio de vigilancia, y por eso dice: 'cuando ya no los bañen las aguas del mar, etc.' Quién niegue una presunción de la Ley debe

presentar pruebas en contrario, y por tanto los dueños de las fincas, colindantes con el mar deben demostrar previamente al Gobierno que tales acrecentamientos no son necesarios para los objetos indicados en la misma Ley, para que aquél haga la declaración de propiedad á favor de los mismos. El Gobierno, bajo las condiciones expresadas, declarará, dice la Ley, propiedad de las fincas colindantes los terrenos que se unen á las playas por accesiones y acrecentamientos que ocasione el mar; luego, antes de esa declaración tales dueños no tienen derecho de propiedad sobre dichos terrenos, ni poseen ningún título sobre los mismos; de lo contrario, sería completamente ociosa é inútil semejante declaración.

"Mientras los particulares no obtengan concesión del Gobierno conforme al inciso 1.o del citado artículo 1.o, las accesiones y acrecentamientos que ocasione el mar son de dominio público.

"Los demandantes citan los artículos 8, 9, y 10 para deducir que los terrenos de propiedad privada colindantes con el mar tienen igualmente que avanzar conforme el mar se retire, y que, según la teoría de la Ley de Aguas, los dueños de los terrenos colin-
34 dantes con el mar se hacen también dueños del aumento ocasionado por aluvión.

"Dichos artículos de la Ley de Aguas son: '8.o—Las heredades colindantes con el mar ó sus playas están sometidas á las servidumbres, salvamento y vigilancia litoral; 9.o—La servidumbre de salvamento comprende una zona de veinte metros contados tierra adentro desde el límite interior de la playa, y de ella se hará uso público en los casos de naufragio para salvar y depositar los restos, efectos, y cargamentos de los buques naúfragos. También los barcos pescadores podrán varar en estas zonas cuando á ello los moviere el estado del mar, depositar momentáneamente sus efectos, sin causar daño á las heredades. Esta zona litoral terrestre ó de salvamento avanzará conforme el mar se retire y se retirará donde el mar avance, porque siempre ha de estar adherida á la playa.' El artículo 10 dice: 'Consiste la servidumbre de vigilancia litoral en la obligación de dejar expedita una vía, que no excederá de seis metros de anchura, demarcada por la administración pública. Esta vía se halla dentro de la zona litoral terrestre de que habla el artículo anterior.'

"Lo que rigorosamente se infiere de dichos artículos, en opinión del Juzgado, es que, cuando la zona litoral terrestre ó de salvamento haya avanzado por haberse retirado el mar, entonces se habrá formado una extensión de terreno entre las líneas de la antigua y de la nueva playa, ó sea intermedio del mar y del terreno que antes era colindante, que es precisamente lo que la ley declara de dominio público. Si, como dicen los demandantes, los terrenos de propiedad privada colindantes con el mar avanzan conforme el mar se retire y los propietarios se hacen también dueños del aumento
35 ocasionado por el aluvión, entonces cual es el acrecentamiento que la ley declara de dominio público? En tal caso la ley carecería de objeto.

"Es verdad que la comisión encargada de redactar la Ley de Aguas, explicando los fundamentos de las disposiciones contenidos en los artículos del proyecto, expresó su opinión de que las heredades

limítrofes al mar ó sus playas deben de gozar del derecho de aluvión, por entender que son aplicables á este caso las razones de justicia y conveniencia en que se funda el derecho de aluvión concedido á los predios ribereños; pero, al discutirse el proyecto se modificó aquella opinión en el sentido expresado en el artículo 4.o de la ley, que corresponde al 7.o de aquel. Y así se explica la diferencia que se nota entre los motivos y la letra de la ley, pués al paso que la comisión opinó que las heredades limítrofes al mar ó sus playas deben gozar del derecho de aluvión, el artículo 4.o dispone que éste dominio público, pero puede pasar á ser propiedad privada en la forma y condiciones allí establecidas.

"El artículo 2.o de la Ley de Puertos de 1880, comentado por Gutiérrez, como queda dicho, siquiera esta ley no se ha hecho extensiva á Filipinas, concuerda con el Artículo 4.o de la Ley de Aguas en cuanto declara igualmente de dominio público los aterramientos que ocasione el mar, diferenciándose sólo sus disposiciones en lo que atañe á la forma de transferirlos á particulares.

"Infiérese de todo lo expuesto que tanto por el Código de las Siete Partidas como por la Ley de Aguas de 13 de Agosto de 1866 las accesiones y aterramientos ocasionados por el mar son de dominio público.

36 "II. Tienen los demandantes título eficaz para reivindicar el terreno en cuestión?

"El título en que se fundan los demandantes es el Exhibit 'J,' que es el contrato de compraventa sobre el mismo terreno otorgado á su favor en 1901 por los herederos de Doña Bartola Franco é inscrito en el Registro de la Propiedad en 23 de Mayo de 1901 y en 5 de Marzo de 1902. En este título se mencionan los otros títulos que tienen los vendedores á la Hacienda de Estanzuela con inclusión de la Punta Sangley.

"Demostrado como queda que los terrenos formados por los aterramientos y accesiones del mar, como el de autos, son de dominio público, la única manera como pudo pasar á propiedad privada es por medio de concesión del gobierno, según la Ley de Aguas. El Exhibit 'J' no expresa ningún título proviniente del gobierno directamente, ni de ningún concesionario que haya traido derecho alguno del gobierno. Los títulos mencionados en el Exhibit 'J' no se refieren al terreno en cuestión. En virtud, pués, de qué derecho vendieron el terreno á los demandantes? En virtud de derecho de accesión? Ya se ha demonstrado que el terreno de autos originariamente es de dominio público.

"Se alega que los demandantes adquirieron la finca de personas que en el Registro aparecen como dueños; pero las pruebas presentadas por los mismos demandantes demuestran que los herederos de Doña Bartola Franco, vendedores del terreno, no aparecen en el Registro como dueños de la Punta Sangley, tal como es y como queda designado en el contrato de 1901.

"Del examen de los títulos de los vendedores resulta: que el terreno heredado por la familia Rodríguez de Doña Bartola Franco es
37 el que ésta compró en 1852 á Don Antonio Iturralde, el mismo que éste, á su vez, compró en 1804 á Don Miguel Velez

Escalante. Cual sea la extensión de la hacienda comprada por Iturralde, no se consigna en la escritura; pero con motivo de la cuestión de deslinde promovida entonces por un llamado Jacinto Colis, quedó determinada en la medición de 1811 practicada por el agrimensor Don Cándido Domínguez en virtud de Real Auto de la Audiencia de Manila de 22 de Septiembre de 1810. Posteriormente Fernández y consortes disputaron á Iturralde porciones de terreno en Cañacao, llamado entonces Punta Sangley, y, mientras el pleito se hallaba pendiente, Iturralde vendió la Hacienda de San Isidro Labrador á Doña Bartola Franco, *con inclusión de la enunciada Punta Sangley en caso que ganen el pleito*, esto es, con inclusión de la Punta tal como Iturralde compró á Escalante, que es la que válidamente podía vender á Bartola Franco caso de ganarse el pleito sobre porciones de terreno dentro de la hacienda que disputaban entonces Fernández y otros. Para la resolución del aludido pleito, hubo necesidad de demarcar la hacienda en 1856; y el resultado de esta operación se ve en el informe emitido por los agrimensores Santiago Arquiza y Vicente Trinidad, que es del tenor siguiente:

"'Que, ratificándose en el informe que han emitido al Sr. Juez durante la operación anunciada, no pueden menos de hacer presente que las diferencias advertidas en varias partes de la hacienda son de poca consideración, puesto que ni alteran la dirección de los rumbos ni afectan al sitio en cuestión, puesto que principian á notarse en puntos distantes de dicho sitio; y por tanto aseguran que atendiéndose, como es preciso se atenga, á las diligencias de medición arriba mencionadas (las de 1811), resulta con toda evidencia: 1.o estar conforme el plano que Vela (Rodríguez) acompañó con la
38 medición practicada en el año 11 (once); 2.o que el sitio en cuestión llamado Punta Sangley es parte de la Hacienda de Estanzuela, pués que se halla dentro de sus límites; y 3.o que todo lo que se nota en algunas partes de dicha hacienda que haya ganado en extensión ó haya perdido por diminución ha sido por efecto del aluvión, como se deja ver por manifestos indicios, y consta demarcado en el plano que exhiben con toda claridad; lo mismo que la circumbalación, rumbos, medidas, y partes más notables de la hacienda, ya con respecto á la medición del año once ya también en lo relativo á la últimamente efectuada.'

"El objeto de este deslinde fué rectificar la medición de 1811 y determinar de ese modo si los terrenos en litigio entre Fernández y Bartola Franco estaban dentro de la Hacienda de Estanzuela, y, habiendo resultado así, aquel pleito se decidió á favor de Bartola Franco por sentencia de 1856. Los agrimensores circumbalaron el terreno por medio de cordeladas conforme á los rumbos de 1811, y en el deslinde incluyeron algunas porciones de terrenos formados por aluvión así como excluyeron otras inundadas por el mar. Se levantó, por órden del Juez, plano de la hacienda, y en el Exhibit 'N' se señala con línea colorada la circumbalación dentro de la cual quedaron fijados los límites de dicha hacienda. El plano, aunque comprende la extremidad de la Punta Sangley, no significa, en opinión del Juzgado, que aquella parte de la Punta pertenezca también á la hacienda. No fué objeto del último deslinde medir

todo el extremo de la Punta é incluirlo en la hacienda; ha sido únicamente para cerciorarse si los terrenos que disputaban Fernández y consortes estaban ó no dentro de los límites de la hacienda como quedó deslindada en 1811. Prueba de que no se ha medido
39 hasta el extremo de la Punta en 1856 es que, fuera de las líneas coloradas en el Exhibit 'N,' que marcan las mediciones hechas, no hay otras mediciones que indiquen haberse incluido en la circumbalación todo el extremo de la Punta.

"Después de la ratificación del deslinde de 1811 practicada en 1856, no aparece en ninguno de los documentos presentados que los herederos de Doña Bartola Franco hayan tratado de probar en el Registro la existencia de accesión alguna fuera de lo incluido en la demarcación hecha en 1856.

"La información posesoria se refiere, según los testigos que allí declararon, á la Hacienda de Estanzuela conforme á los títulos y planos que de ella poseía la familia Rodríguez, ó sea la hacienda que Doña Bartola compró á Iturralde. Si, pués, este expediente, con los demás documentos ya mencionados, es el que quedó inscrito en el Registro de la Propiedad, forzosamente tenemos que concluir que el terreno inscrito es únicamente el que fué deslindado en 1811 y ratificado en 1856, y no todo el extremo de la Punta tal como existía en dicho año 1856.

"En el Exhibit 'J' se dice, en su cláusula primera, que la extensión de la finca es la que resulta de las medidas de circumbalación practicadas por el Agrimensor Don Cándido Domínguez en 1811, consignadas y descritas en el respectivo asiento del Registro de la Propiedad, de que se hace mención en el párrafo siguiente. En el párrafo siguiente, que es la cláusula segunda del contrato, el registrador (Exhibit 'K') hace la descripción con arreglo á la medición de 1811. Por tanto, la extensión de la finca inscrita á favor de la familia Rodríguez es la señalada en el deslinde del año referido 1811. Pero en la cláusula quinta los vendedores describen y deslindan un terreno que está fuera del demarcado en 1856, y, por tanto,
40 no inscrito en el registro.

"Que la línea de la playa hacia la extremidad de la Punta Sangley ha seguido constituyendo el lindero de la hacienda entre los años 1811 y 1903; que durante aquella época la línea de la playa á la extremidad de la Punta Sangley ha ido avanzando considerablemente conforme íbase formando nuevo terreno por efecto de la acción del mar; y que en todo tiempo hasta la fecha actual el terreno situado adentro de esa línea de la playa se ha venido conociendo por Punta Sangley—no cabe inferir de ahí que, una vez inscrita á favor de los herederos de Rodríguez la Punta Sangley como quedó deslindada en 1811, queda ipso facto inscrita la Punta tal como es y queda deslindada en el contrato de 1901. Los efectos de la inscripción no pueden extenderse á más de lo que realmente aparece inscrito en el registro, y si hay aluvión, como está admitido en el presente caso, el propietario que se crea con derecho á ello debe probar su existencia en el mismo registro. Galindo y Escosura, en sus comentarios á la Legislación Hipotecaria, dicen, hablando de la inscripción de las accesiones naturales, Tomo I., p. 329: 'No dejan de presentarse

dificultades para la inscripción de las accesiones naturales. En la causada por la fuerza del río ó abulcion parece necesaria una escritura de conformidad del dueño de la finca á la que se ha unido el trozo segregado ó una declaración judicial en su caso: el aluvión habrá que justificar, cuando menos, por una nueva medición y declaración de peritos en documento público.' . . .

"El hecho de estar inscrito en el Registro de la Propiedad el contrato de compraventa otorgado por los herederos de la familia Rodríguez á favor de los demandantes, Ker y Compañía
41 (Exhibit 'J'), hace presumir legalmente de que, al inscribirse el contrato de 1901, debió estar inscrito el derecho de los vendedores, porque es de suponer que se ha cumplido con las formalidades de la ley (Art. 334, No. 31, del Código de Procedimiento Civil), pero la misma Ley Hipotecaria admite la posibilidad de lo contrario, y por eso semejante presunción, como juris tantum que es, no puede subsistir ante las pruebas que destruyen la verdad de los hechos en que aquella se apoya.

"Probado, como cree el Juzgado, que el título inscrito de los que vendieron el terreno á los demandantes se refiere únicamente á la Punta Sangley tal como quedó demarcado en 1811, y no apareciendo ninguna inscripción á favor de aquellos de los terrenos existentes fuera de la demarcación hecha en 1856, la proposición de que los demandantes compraron el terreno de personas que figuran como dueñas en el registro no está apoyada por las pruebas. Si los herederos de Bartola Franco, al hacer la transferencia á favor de los demandantes, se fundaron en el título que tenían sobre Punta Sangley, as evidente que no podían transferir por virtud de dicho título más de lo que aparecía inscrito en el Registro de la Propiedad.

"Como el título en virtud del cual se ejercita una acción reivindicatoria debe estar revestido de todos los requisitos legales, es preciso que, tratándose de bienes de dominio público, el reivindicante demuestre en su título la concesión del Gobierno directamente á él ó á otros concessionarios. El Tribunal Supremo de España, en sentencia de 21 de Octubre de 1880, ha declarado que: 'Una escritura de venta de un terreno, si bién tiene toda la fuerza necesaria para probar que se celebró este contrato por las partes, es in-
42 suficiente para justificar el dominio de los vendedores y, mayormente, para reivindicar el de un tercero que viene poseyéndolo por más de treinta años, á quien se reconoce que ha ejercido en ese tiempo actos de dominio, aunque calificándolos de abusivos y arbitrarios, pero á los cuales no se oponen otros más ligítimos de los vendedores y sus causantes ni del comprador y sus derivados, ninguno de los cuales ha figurado como dueño ó como poseedor de la finca litigiosa en los catastros y amillaramientos.' El mismo Tribunal Supremo, en sentencia de 11 de Enero de 1885, establece la doctrina de que: 'La inscripción en el Registro de la Propiedad no es título de derecho por sí, sino corroboración y garantía de los que revisten tal solemnidad, y debe, por tanto, apreciarse cuando se trata de terceros, por su propia naturaleza y extensión, y no por los términos más ó menos vagos del registro.' Y, entre otras varias sentencias, la de 21 de Octubre de 1880 ha declarado igual-

mente que: 'Con arreglo á la Ley 28, Tít. 2.a, Partida 3.a, cuando el que reclama una cosa como suya no puede probar que le pertenece el señorío de ella, siempre conserva la posesión el demandado, por más que no muestre ningún derecho para retenerla.' Y la Corte Suprema de estas islas, en sentencia de 22 de Abril de 1904, en la causa La Compañia General de Tabacos contra Miguel Tupino y otros, dice: 'Que en un juicio sobre reivindicación el demandante que pretende la restitución de la posesión de terrenos ocupados por otro debe fundarse en la legalidad de su propio derecho más bién que en la deficiencia del título del demandado, y al que alegue ese dominio es á quien incumbe probarlo.'

"En cuanto á la indemnización de daños solicitada por los demandantes, basta decir que, si bién está justificada la cuantía de los que se exigen al demandado, no así la culpa por parte de éste, y por tanto no procede la condena de daños conforme á las
43 doctrinas sentadas en las sentencias del Tribunal Supremo de España de 10 de Marzo de 1893 y 9 de Abril de 1898, cuyas doctrinas están sostenidas igualmente por las decisiones citadas por el demandado en la página 41 de su argumento.

"Con lo que queda establecido respecto de las dos cuestiones enunciadas no será ya necesario discutir la defensa de prescripción alegada por el demandado, porque, siendo de dominio público el terreno de autos, el gobierno no necesita prescribirlo, pués nadie prescribe lo que es suyo.

"Resumiendo lo expuesto, el Juzgado deduce las siguientes conclusiones de derecho:

"1.a. Que el terreno en litigio formado por los depósitos y acrecentamientos del mar es de dominio público, y solamente puede pasar á propiedad privada en la forma y condiciones establecidas en las leyes.

"2.a. Que el contrato de compraventa en que se apoyan los demandantes, como no expresa ningún título proviniente del gobierno ó de sus concesionarios, es insuficiente para reivindicar el terreno del demandado, cuyo derecho está garantido por la ley antes de la inscripción de dicho contrato.

"3.a. Que poseyendo el demandado el terreno reclamado de buena fey en cumplimiento de sus deberes oficiales, no está obligado á pagar daño alguno.

"En su virtud el Juzgado es de parecer que el demandado debe ser absuelto de la demanda, con costas á los demandantes, y.

"Así se ordena.

(Firmado) "IGNACIO VILLAMOR,
"Juez del 6.o Distrito Judicial."

44 Á esta sentencia excepcionóse la demandante en debida forma.

En 20 de Septiembre de 1904, y dentro del término de la sesión del Juzgado en que fué dictada la sentencia, presentó la demandante una moción pidiendo que fuese anulada la sentencia y concedida nueva vista, fundándose en el motivo de que las deducciones de

hecho expresadas en la sentencia se oponen clara y manifiestamente á la preponderancia de las pruebas, y que dicha sentencia es contraria á la ley.

Fué desestimada esta moción, y la demandante se excepcionó en debida forma.

En 27 de Septiembre de 1904 la demandante dió parte en debida forma al Juzgado de su intención de perfeccionar una pieza de excepciones.

Especifica la demandante, como parte de esta pieza de excepciones que no haya de imprimirse, con arreglo á las disposiciones de la Ley No. 1123, todas cuantas pruebas, tanto orales como documentarias, se hayan introducido en la presente causa.

Mediante estipulación verbal de ambas partes, el plazo para la preparación de esta pieza de excepciones ha sido extendido hasta la fecha actual. La demandante presenta ahora la preinserta pieza de excepciones, y al Juzgado suplica que quede la misma aprobada, certificada, y firmada.

Manila, 28 de Octubre de 1904.

(Firmado) PILLSBURY & SUTRO,
Abogados de la Demandante.

45 ESTADOS UNIDOS DE AMÉRICA,
Islas Filipinas:

Corte de Primera Instancia de Cavite.

Causa Civil No. 179.

Sobre "Reivindicación."

D. KER Y COMP., Demandante,
contra
D. MR. R. COUDEN, Demandado.

En el Juzgado de Primera Instancia de Cavite, á 3 de Diciembre de 1904.

Presentes: El Hon. Juez del Distrito; El Abogado Sr. Lawrence, por el demandante; El Abogado Sr. F. Salas, por el demandado.

Abierta la sesión por el Sheriff el Hon. Juez concedió la palabra á las partes; después de discutir sobre la aprobación de la pieza de excepciones, el demandado pidió que se añada á la pieza de excepciones del demandante las objecciones presentadas por el demandado. El demandante replicó diciendo que la pieza de excepciones debe contener solamente las excepciones del apelante y después de oido las partes el Sr. Juez acordó que se añada como parte de la pieza de excepciones las razones alegadas por el demandado para fundamentar sus objeciones á la presentación de los Exhibits del demandante tal como se lee en el primer párrafo de la página 32 de los autos en castellano.

46 Contra esta decisión se excepcionó el demandado. Con lo cual se dió por terminado el acto que firman después del Sr.

Juez de que doy fé.—Firmado—Ignacio Villamor—Juez—Por el Fiscal Gral.—Fernando Salas—W. H. Lawrence—Abogado de la apelante.—Ladislao Diwa.

Adición á la Pieza de Excepciones Conforme al Acuerdo de Fecha 3 de Diciembre.

Primer párrafo de la página 32 (autos en castellano).

Mr. GOLDSBOROUGH: "El defensor del demandado desea reservar la misma objeción contra la nota de reinscripción que hizo contra el exhibit 'K.' Apareciendo que los autos del juicio anterior no demuestran en detalle los fundamentos de las objeciones presentadas por el demandado contra los exhibits de los demandantes, el defensor del demandado ruega que se tome nota de que los exhibits de los demandantes 'D,' 'E' y 'F' fueron rechazados por el demandado bajo el fundamento de que eran impertinentes y no se referían al terreno en cuestión; así como los exhibits 'G,' 'H,' y 'L,' como impertinentes, porque no demuestran que se refieren al terreno en cuestión; los exhibits 'L' y 'LL' que como fueron presentados en procedimiento entre personas de los que el demandado no era parte, y por lo tanto no procede á su presentación, como pruebas contra el demandado; y los exhibits 'I' y 'J,' como impertinentes, pués no se ha demostrado que los vendedores á Ker y Compañía tuvieran derecho al terreno ya referido; y que dichos exhibits fueron admitidos sujetos á dichas objeciones."

Juzgado de Primera Instancia de Cavite, á tres de Diciembre de mil Novecientos Cuatro.

Doy fé que la anterior pieza de excepciones es cierta y ex-
47 presa todos los extremos esenciales á la clara comprensión de los errores señalados. Se ordena al Escribano del Juzgado de Primera Instancia de Cavite que compulse testimonio complete de dicha pieza de excepciones á solicitud de la excepcionante, y previa satisfacción de los derechos correspondientes á fin de que dicha pieza de excepciones sea elevada á la Corte Suprema dentro de sesenta días á contar desde esta fecha, con objeto de que los errores que se suponen cometidos puedan ser considerados y corregidos.

(Firmado) IGNACIO VILLAMOR,
Juez del 6.o Distrito.

LOS ESTADOS UNIDOS DE AMÉRICA,
Islas Filipinos:

Juzgado de Primera Instancia de la Provincia de Cavite, P. I., Sexto Distrito.

Yo, Ladislao Diwa, Escribano de este Juzgado, doy fé que he examinado el adjunto documento, á saber, la pieza de excepciones de la causa civil No. 179 sobre Reivindicación de Punta Sangley, entre Ker y Compañía, demandante, y Dr. A. R. Couden, demandado, la

cual se eleva á la Corte Suprema con los autos originales en inglés y en castellano y todas las demas pruebas introducidas en juicio á los efectos de la apelación interpuesta por el demandante.

Y que lo he cotejado con su original obrante en esta Escribanía de mi cargo, del cual es copia fiel y verdadera.

Y para que conste así, he firmado la presente certificación, y la he sellado con sello oficial de este Juzgado hoy, 16 de Enero de
48 1905.

LADISLADO DIWA, *Escribano.*

Which bill of exceptions, rendered into English, is as follows, to wit:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the Province of Cavite.

Civil Case No. 179.

KER & COMPANY, a Mercantile Partnership, Plaintiff,
versus
ALBERT R. COUDEN, Defendant.

Bill of Exceptions.

This case was begun in December, 1903, upon a complaint the original of which was drawn in English and was accompanied by a translation into Spanish, and which, copied to the letter, is as follows:

(Title of Court and Cause.)

"Plaintiff alleges:

I.

"That plaintiff is, and at all the times hereinafter mentioned has been a commercial partnership (sociedad en comandita),
49 duly constituted and existing in accordance with the laws of the Philippine Islands, and duly registered in the commercial registry at Manila, Philippine Islands.

II.

"That plaintiff is, and at all the times hereinafter mentioned was, the owner in fee simple entitled to the possession of all that certain tract and parcel of land, being a portion of what is known as Sangley Point, lying and situated within the municipal district of San Roque, Province of Cavite, Island of Luzón, Philippine Islands, bounded on the north by Manila Bay, on the east by Manila Bay and Cañacao Cove (Ensenada de Cañacao), on the south by Manila Bay, Cañacao Cove, and the northeasterly boundary line of the land of the Manila Shipyard (Varadero de Manila) and by the direct pro-

longation of said northeasterly boundary line in a straight line northwesterly to Manila Bay, and on the west by the said northeasterly boundary of the said shipyard (Varadero), and by the said prolongation thereof and by Manila Bay.

"That a diagram or outline plan of the said property is annexed to this complaint, marked 'Exhibit A,' to which the plaintiff refers and which is made a part of this complaint.

"That the plaintiff is unable to give a description of said property by metes and bounds or to specify the superficial contents thereof, because the defendant, although thereunto requested, has refused and still refuses to permit the plaintiff to make a survey thereof or to furnish any information whatever respecting the boundaries or area thereof.

III.

"That the defendant heretofore, to-wit:—on the 17th day
50 of November, 1902, against the will and consent of this plaintiff, and without right so to do, entered into possession of the land described in the preceding paragraph and of every part thereof, and has, ever since said last named date, retained possession of said land and the whole thereof against the will and consent of this plaintiff, and without any right so to do.

IV.

"That plaintiff has duly demanded possession of said land from the defendant, but the defendant refused and still refuses to surrender the same to plaintiff.

V.

"That by reason of the aforesaid acts of the defendant the plaintiff has suffered damage in the sum of upwards of fifteen hundred dollars ($1500.00), United States Currency, monthly, in each and every month since said 17th day of November, 1902.

"Wherefore, plaintiff prays judgment against the defendant for the possession of said land, and for damages in the sum of fifteen hundred dollars ($1500.00), United States Currency, monthly, for each and every month since said 17th day of November, 1902, until possession shall be delivered to the plaintiff by the defendant, together with interest, and for the costs of this suit.

(Signed) LYON & WOLFSON,
(Signed) OSCAR SUTRO,
"Attorneys for Plaintiff.

"UNITED STATES OF AMERICA,
Philippine Islands, City of Manila, ss:

"Jas. M. Beattie, being duly sworn, deposes and says that
51 he is one of the members of the plaintiff firm referred to in the foregoing complaint; that he has read the foregoing complaint and knows the contents thereof, and that the same is true, except as to the matters therein alleged on information and belief, and that as to those matters he believes it to be true.

(Signed) "JAS. M. BEATTIE.

"Sworn to and subscribed before me this 5th day of December, 1903, at the City of Manila, P. I.

"[SEAL.] (Signed) W. H. LAWRENCE,
"*Notary Public.*

"My commission expires January 1, 1905.

"(The foregoing is a translation of its original in English.)

After the citation and copy of the complaint had been duly served upon the defendant, the defendant appeared by the Honorable Gregorio Araneta, Attorney-General of the Philippine Islands, and, in the month of January, 1904, filed the following answer:

(Title of Court and Cause.)

"For answer to the plaintiffs' complaint, the defendant says:

"1. He has no information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the complaint herein contained and, therefore, denies the same and each of them.

"2. He denies each and every allegation in paragraphs 2, 3, 4 and 5 of the complaint herein contained, except in so far as hereinafter admitted.

"3. He is, and continually since a date long prior to the 17th day of November, 1902, has been, a commissioned officer of the
52 Navy of the United States, and on said date, by order of his superior officers in said Navy he became and has since been, Commandant of the United States Navy Yard at Cavite, a part of which then was and now is located on that portion of Sangley Point referred to in the complaint, and, as such Commandant, has declined to surrender, or to permit the plaintiffs to survey or otherwise trespass upon, said portion of said Point.

"4. For special defense the defendant says, that said portion of said Point is made land added to the old shore line by accretions and deposits caused by the action of the sea and is part of the public domain of the Government.

"5. For separate special defense the defendant says, that he is in possession of said portion of said Point only in his official capacity and acting under the authority of the United States, and that the United States and its predecessor in possession, Spain, through their authorized officers, have been in apparent uninterrupted possession of the said portion of said Point, as it grew from the accretions and deposits of the sea, for upwards of thirty-six years prior to the commencement of this action.

"6. For further separate special defense the defendant says, that the cause of action set forth in plaintiffs' complaint did not accrue within thirty-six years before the filing of the complaint.

"Wherefore the defendant prays judgment against the plaintiffs dismissing the complaint and for the costs of this action and for such other and further relief as to the court may seem just.

(Signed) "GREGORIO ARANETA,
"*Acting Attorney General, Attorney for Defendant.*

"Ayuntamiento, Manila, P. I."

53 On March 12, 1904, the day set for the trial of the present cause, the parties appeared in court, and, after several sessions, the trial was concluded on the 15th day of April, 1904.

The plaintiff company having completed the presentation of its evidence, the defendant offered, as evidence in his favor, the document marked "Documento Anexo I," copy of which is made a part of this bill of exceptions.

The attorney for the plaintiff company interposed the following objection: "I object to the introduction of the document referred to, on the ground that the said document has no connection whatever with the question under discussion, for the following reasons: that it is admitted that the land which is the subject of the suit is alluvial. I admit that the instrument contains an admission to the effect that Government buildings are situated on certain defined land, but I contend that it does not appear that the land on which these buildings were located is the same land which is now the subject of suit. I object to the introduction of evidence for the purpose of showing the existence in the Government of a title by prescription or by possession on the part of the Government, against Ker & Company, the latter being a third party which has purchased a recorded title against which the Government cannot now allege an unrecorded title."

This objection on the part of the plaintiff was overruled, and the document presented was admitted, marked "Documento Anexo I (uno) del demandado," to which decision the plaintiff excepted.

The defendant then called as a witness JOSÉ ITURRALDE, whose testimony is in part as follows:

"Q. Will you please look at this certified copy of a notarial act which I show you, and which purports to contain copy of a
54 letter dated March 21, 1884, signed José Iturralde, and state if you are the person who signed that letter?

"A. Yes, sir, I am the same person.

"Q. In what capacity with relation to the owners of the land referred to in said letter did you write same?

"A. In behalf of the owners of the land.

"Q. Did the owners of the land authorize you to act for them in this respect?

"A. Yes, sir, verbally.

"Q. To the letter referred to in the preceding questions and answers a plan of the Cañacao land was attached according to its contents—please look at this plan which I now show you and state whether or not that was the plan which accompanied your said letter.

"A. I do not recollect. I do not remember having seen that plan. It may be that Messrs. Peele and Hubbell signed it, but I have no recollection of having done so. I wrote the letter in accordance with my instructions—it may be that this plan went with it but I do not remember it.

"Mr. SUTRO: It is admitted by the counsel for plaintiff that the certified signature appearing on plan referred to is that of Miguel Torres, the notary.

"Mr. GOLDSBOROUGH: The certificate and plan are offered in evidence by defendant's counsel, who requests that they be marked respectively Exhibits '6' and '7,' this being the plan (presenting the one in question) for the purpose of showing the limits of Sangley Point with reference to Varadero.

"Mr. SUTRO: I object to the letter as being incompetent. According to the Codes one acting by verbal authority cannot
55 bind the owner of land. As to the plan, even if it were presented by Mr. Iturralde, it does not appear that it is correct, or who made it; finally, the witness himself cannot state that this is the same plan, and it does not appear where the data came from, from which these lines of 1822, 1840 and 1860 were taken, and it is apparent on the face of it that this is merely a sketch map. It is one of the plans that the counsel for the defendant is unwilling to admit the correctness of. This plan is a facsimile of the one already offered and to which I have objected, and the same objections made to that are applicable to this one.

"JUDGE: Exhibit No. 6 is admitted.

"Mr. SUTRO: Exception.

"JUDGE: Ruling reserved as to the plan marked for identification number '7'."

The defendant offered in evidence a document marked "Exhibit 8" of the defendant, copy of which is made a part of this bill of exceptions. To this the plaintiff objected, on the ground that the proof offered was not proper; that it consisted of a report made by Admiral Montojo, a former representative of the Spanish Government, the predecessor in interest of the defendant; that said report contained the opinion of Admiral Montojo. The Court reserved decision, but subsequently the said document "Exhibit 8" was admitted in evidence, and the plaintiff excepted in due form to its admission.

The defendant offered in evidence a document marked "Exhibit 9," copy of which is made a part of this bill of exceptions. The
56 plaintiff objected to the introduction of this document, on the ground that the same was impertinent and that it was neither proper nor connected with the points at issue in the case, it being contended in support of the objection that said "Exhibit 9" refers to lands different from those which are the subject of this action, that the title alleged by the defendant is not recorded and cannot be offered in opposition to the recorded title of the plaintiff, and that said exhibit contains a statement made by the defendant himself in his own interest. The decision of the court was reserved. Subsequently said document was admitted in evidence, the plaintiff duly excepting to the admission thereof.

EUSEBIO QUINTOS, having been called as a witness for the defendant, testified in part as follows:

"We call Cañacao from the end of the corral up to the end of the hospital, that is what we call Cañacao; from that end to the end above we call Varadero—from the extreme end of the hospital, where the hospital is now, up to the pantalan next to the Varadero.

"Q. Who occupied these points called Cañacao and Varadero?"

To this question the plaintiff objected, on the ground that it called for a conclusion or opinion of the witness.

The objection was overruled and an exception noted by the plaintiff.

"A. The Navy, all of it.

"Mr. ARANETA: And the laborers which you have referred to—were they navy employees?

"A. Yes, sir.

"Q. Which persons were the only ones that occupied those places?"

57 The plaintiff objected to this question, on the ground that the same was grossly leading.

Objection overruled and exception noted.

The same witness was afterwards asked by Mr. Araneta:

"As I understand you, then, the gate forming the entrance to the land occupied by the Navy in Cañacao was at the same place in 1859 as it is today; is that correct?"

The plaintiff objected to this question, on the ground that the same was grossly leading and assumed a fact not proven in evidence.

The objection was overruled and the plaintiff excepted.

"A. The location is the same."

A. L. PARSONS was called as a witness for the defendant and submitted the plan—"Exhibit No. 3 of the defendant—drawn by the witness and showing Sangley Point as it existed at the time of the trial, in March, 1904. This witness was asked by the attorney for defendant:

"What is indicated on this plan, 'Exhibit No. 3,' by the outline in which is contained the words 'New Coal Plant'?"

The plaintiff objected to this question on the ground that the same was immaterial and irrelevant to the case, inasmuch as everything done on the Point since 1901 and the date of the filing of the complaint is neither relevant nor material in connection with the present cause.

The objection was overruled and the plaintiff excepted.

"A. A storage plant for coal being erected by the Atlantic, Gulf and Pacific Company of New York City for the U. S. Government."

58 The same objection was made and the same decision was rendered and exception noted with respect to subsequent questions which brought out the description of the coal plants, of the temporary buildings erected by the contractor in connection with the construction of a coaling station for the Navy, of the wharves for the loading and discharging of coal, of the new hospital which is at present being built by the United States Government to be used as a naval hospital, of a building used as a guard house and for the storage of articles belonging to the Navy, and of a place now utilized

as a target range by the sailors and marines of the United States Navy.

The defendant offered in evidence a certified copy of a notice given by Messrs. Peele and Robinson of their intention to file a petition for a concession for the construction of a shipyard on Sangley Point, the said notice being published in the Manila Gazette on September 26, 1881. This document was marked "Exhibit No. 4 del demandado," and a copy thereof is made a part of this bill of exceptions.

The plaintiff objected to this evidence on the ground that the same was not relevant, material or competent with regard to the point at issue, arguing that the document refers solely to a parcel of land not included in those which constitute the subject of this action, and that as against the recorded title of the plaintiff proof of an unrecorded title obtained by prescription is not admissible.

This objection was overruled and "Exhibit No. 4" of the defendant was received in evidence, to which decision the plaintiff excepted.

59 The defendant offered in evidence a certified copy of the concession for the shipyard, published in the Manila Gazette on September 20, 1884, marked "Exhibit No. 5" of the defendant. A copy of this exhibit is made a part of this bill of exceptions.

The plaintiff objected to this offer, on the ground that the said document is incompetent, irrelevant and immaterial in connection with the point at issue; that it does not tend to establish any matter in controversy in the cause; that it consists of a decree entered in a proceeding in which Doña María Bartola Franco, the predecessor in interest of the plaintiff, was not a party; that it only affects land outside of the limits of the land upon which this suit is brought; that its object was to establish a prescriptive title in the Government, and, the said title not being recorded, it is not competent to introduce evidence in support thereof as against the recorded title of the plaintiff purchased in good faith; that said exhibit contains a declaration on the part of the Government made by the latter for the purpose of serving its own interests, which cannot be admitted in evidence against the title of the plaintiff.

The objection was overruled and "Exhibit No. 5" of the defendant was admitted in evidence, to which decision the plaintiff excepted.

The witness VICTOR BORROMEO, called by the defendant, was asked by the latter:

"Q. Do you know the place now occupied by the varadero?

"A. Yes.

"Q. From the gate up to the varadero, can you tell me what buildings there were?"

60 The plaintiff objected to this question on the ground that it was leading, incompetent and irrelevant to the point at issue, the witness being questioned regarding a piece of land which is not the land, nor any part thereof, which is in litigation; that the possession by the Government of this land cannot tend to establish

any matter in controversy in the cause; that the Government has no right to establish a title by prescription against the recorded title of the plaintiff, acquired in good faith; and that it is not proper to introduce evidence for the purpose of establishing possession on the part of the Government until the record of possession and title of the plaintiff is canceled and annulled.

The objection was overruled. The plaintiff excepted.

"A. Beginning with the Commandant's office—where the Commandant was—the barracks for the marines followed—then the house for the paymaster—a nipa house where coal was stored. There were also other nipa houses where lumber was deposited; lastly, the pantalan where the coal was discharged. That's all."

This witness was questioned at length, the questions all referring to the land situated between the hospital gate and the shipyard, which land it is admitted is not the land which is the subject of the present action.

To all these questions the plaintiff interposed the same objection. The same decision was rendered, and the exception of the plaintiff was noted.

The defendant offered in evidence pages 169 and 170 of the Geográphical, Geological and Statistical History of the Philippines, by Agustin de la Cavada, published in Manila in 1878, the said volume having been obtained from the library of the Office
61 of Insular Records. A copy of said pages, marked "Exhibit No. 10" of the defendant, is made a part of this bill of exceptions.

The plaintiff objected to this offer on the ground that said exhibit was incompetent, irrelevant and immaterial with regard to the point at issue, the said pages not being certified and their contents consisting of merely hearsay evidence, the author of the book being, at the time of the publication thereof, an official of the Spanish Government, the predecessor in interest of the defendant.

The decision of the Court was reserved at the time, but the said exhibit was afterwards admitted in evidence, to which admission the plaintiff excepted.

ENRIQUE BARRERA, a witness called by the plaintiff to rebut the defendant's evidence, was questioned in part as follows:

The witness states that he knows Carlos de las Heras, who, in the time of the Spanish sovereignty, was chief of military engineers, and who had spoken with the witness with reference to the construction of the fort at Sangley Point.

"Q. What did he tell you about that battery?"

The defendant objected to this question on the ground that the same was incompetent, because its object was to have included in the evidence a statement made by a third party in a conversation had between the witness and another party, at which conversation the defendant was not present.

The question was withdrawn.

"Q. Do you know who built the fort, who was the engineer who built the fort on Sangley Point?

"A. I must answer by what I have heard.

62 "Q. Did Mr. Carlos de las Heras tell you that he built the battery or supervised its building?"

The defendant objected to this question on the ground that the same was inadmissible, inasmuch as it attempted to make the witness state things that he had only heard. The defendant argued to the effect that the Government is not a party to this case, and that a statement made by any Government official, even if he is dead, unless it falls within some special provision of the Code, is not admissible against the defendant; that the only way of introducing against the defendant a statement made by this Spanish official would be to call that official as a witness.

"JUDGE: Is Señor Heras alive?

"A. Yes, sir, he is in Spain."

The objection of the defendant was sustained. The defendant excepted to this decision and offered to prove by the witness that Carlos de las Heras, military engineer of the Spanish military forces in the year 1884 and following years, had stated to the witness that the fort constructed on Sangley Point had been erected by the military branch of the Spanish Government, that it was only placed there temporarily, and that he was the one who placed it there. The last question, which the Court had ordered stricken out, was made a part of this offer. The Court sustained the objection interposed against this offer of the plaintiff, and the latter excepted.

The trial was finished on September 14, 1904, and the following judgment in favor of the defendant was rendered and entered:

63 (Title of Court and Cause.)

"Judgment.

"The present cause turns upon that certain tongue of land situated in Manila Bay and the Cove of Cañacao, within the limits of the old pueblo of San Roque, Province of Cavite, and known by the name of Punta Sangley or Sangley Point, the ownership whereof plaintiffs claim from defendant who is in actual possession of the same to the exclusion of the former, said claim of plaintiffs being based upon the ground that they are the absolute owners, with the right to the possession, of the land described in the complaint, and that the defendant, on November 17, 1902, against the will and without the consent of plaintiffs, and without any right whatsoever so to do, took possession of said land, thus causing to plaintiffs damages in a sum exceeding Fifteen Hundred Dollars, U. S. currency, monthly, from the 17th day of November, 1902.

"The defendant denies all the allegations of the complaint, and, by way of special defense, alleges: That the land claimed was formed by deposits and accretions caused by the action of the sea, and is

part of the public domain; (2) that the cause of action of plaintiffs did not arise during the thirty-six years immediately preceding the date of the complaint; and (3) that defendant is retaining possession of the land in his official capacity and acting under the authority of the Government of the United States.

"The plaintiffs, in support of their action, filed Exhibit 'J,' which is a document dated August 16, 1901, and which purports to
64 be a transfer of ownership of that portion of Sangley Point comprised between the varadero (dry dock) and the end of the Point, said transfer purporting to have been executed by the Rodríguez family in favor of Ker & Co. In the said instrument it is set forth that at that time the Rodríguez family were the owners of an estate (hacienda) called 'San Isidro Labrador' or 'Estanzuela,' including all its appurtenances and the lands known as Sangley Point or Cañacao, the boundaries of said hacienda being, on the north, the Bay of Manila; on the south, the Isthmus of Darahican and the lands of Leyton belonging to Don José Basa; on the east the Cove of Cañacao, an estero (canal) of the pueblo of San Roque, and the Cove of Bacoor; and, on the west, the Bay of Manila; that the said hacienda had been acquired by their ancestor, María Bartola, from the Iturraldes by virtue of an instrument executed in the pueblo of Binondo the 13th day of July, 1852 (Plaintiffs' Exhibit 'E'); and that the sale to Ker & Co. was made subject to the condition that 'The vendors should not be responsible for the defense of the title to, or indemnity for the loss of, that portion of the land occupied by a coast battery, the purchasers accepting the transfer subject to such effects as may result from the present occupation of said battery by the forces of the American Government as well as to such servitudes as may have been acquired thereupon under the Spanish laws or under such laws as are actually in force.'

"As corroborative of this evidence or proof, Exhibits 'D,' 'E,' 'F,' 'G,' 'H,' 'I,' 'K,' 'L,' 'LL,' and 'M' were introduced. The contents of these documents are recorded in Exhibit 'K,' which is a certificate issued by the Registrar of Property of Cavite, and in which
65 are noted the documents which were presented to said Registrar in connection with and for the purpose of the inscription of the Hacienda de San Isidro Labrador or 'Estanzuela,' to wit: (1) First copy of deed executed August 29, 1804, by Don Juan Pablo Infante, Doña Ana María Valez de Escalante, and Don Felix Ruiz in favor of Don Juan Antonio Iturralde, before Don Pedro Alejandrino Flores, Royal and Public Clerk of Manila, said first copy being issued the 15th day of July, 1852, by Clerk Don Pedro Forras; (2) First copy of deed of purchase and sale executed by Doña Dolores, Don Joaquin, and Doña Agapita Iturralde in favor of Doña Bartola Franco the 13th day of July, 1852, before Don Doroteo Martin de Angeles, Public Writer of Binondo, and issued by the said notary upon the day of its execution; (3) Record of the operations of survey made by the Judge of First Instance of Cavite by virtue of order of the Real Audiencia of Manila, said record being issued by Clerk Don Marcelino Jesús Amador on November 7, 1854; (4) Inventory and partition of the property of

Doña María Bartola Franco, widow of Don José Rodríguez Vela, between her three children and heirs, Doña Carmen, Don Enrique, and Doña Josefa Rodríguez y Franco, recorded the 29th day of April, 1884, in the Court of Cavite, after due ratification thereof by the said heirs, the first named of such heirs acting with the consent of her husband, Don Jacinto Selando y Paz; (5) Copy issued by Don Estanislao Hernández, qualified clerk of the Court of Cavite, of the judgment rendered the 28th day of November, 1856, by Don Manuel Asensi, Judge of First Instance of Cavite, and Royal Order of the Audiencia of Manila of June 9, 1857, relative to the judicial proceedings between Don José Rodríguez Vela, in the name of his wife, Doña Bartola Franco, and José Fernández, as repre-
66 senting Julian Francisco and his codefendants, in connection with the ownership of the site known as Sangley Point, of the pueblo of San Roque; (6) Summary investigation (sumaria información) had at the instance of Don Enrique, Doña Carmen, and Doña Josefa Rodríguez, and approved by judgment rendered the 31st day of May, 1883, by Don Adolfo García de Castro, Judge of First Instance of Cavite.

"The defendant objected to the introduction of these documents, alleging that they have no bearing upon the land which is the subject of the complaint; but the court admitted them subject to their relevancy to the case being determined later, and also on the ground that, as public and authentic documents, they may be received in evidence (Art. 299 Code Civil Procedure).

"From an examination of these documents it appears that they refer to the Hacienda of San Isidro Labrador and Sangley Point as surveyed in 1811 and bounded for the second time in 1856. The judgment of 1856 (Exhibit 'L') refers to the lands of Sangley Point comprised in the survey and measurement of 1811, as is attested by the surveyors who corrected said measurement in the year 1856, and this appears practically in Exhibit 'N' of plaintiffs. The same information ad perpetuam (Exhibit 'L') is limited to the Hacienda Estanzuela and Cañacao or Sangley Point, according to the titles and plans in connection with the same held by the deceased Doña Bartola Franco Rodríguez Vela.

"The value, therefore, of said documents as regards the question at issue is secondary, inasmuch as they merely tend to establish that the vendors have title to the Hacienda de Estanzuela as surveyed and bounded in 1811, which survey was rectified in 1856.

67 "As to the origin and formation of the land in question, plaintiffs admit that it has resulted from deposits left by the action of the sea, as is alleged by defendant in the 4th paragraph of his answer. Defendant's witnesses who have testified upon this point, and particularly Exhibit No. '10' of defendant, show that Sangley Point has been growing in extent from 1811 to the present time, a certain number of additional meters of land appearing from year to year. Said Exhibit No. '10' is part of a Geographical, Geological, and Statistical History of the Philippine Islands, and was admitted in evidence at the trial in accordance with Art. 320 of the Code of Civil Procedure.

"As to the topographical situation of the land, both parties introduced various plans, defendant's Exhibit No. '2' and plaintiffs' Exhibit 'N' being correct and admitted by the parties.

"Plan No. 2 was drawn by Mr. Archibald Livingstone Parsons, civil engineer of the U. S. Navy, in accordance with the records of the measurements of 1811 and 1856 which appear in Exhibits 'K' and 'N' of plaintiffs.

"In so far as regards the facts of the case, the occupation of the land in question was made the subject of discussion and of documentary proof and oral evidence, plaintiffs alleging that in December, 1900, and in January and February, 1901, they undertook to clean the land in question of weeds and undergrowth, which work was not completed and had to be abandoned by reason of their being ejected from the land by the navy of the United States stationed in Cavite; that certain parties named Alfaro, Aquino, and Ferrer (pp. 142, 150, & 170, respectively, of the record) paid rent (canon)
68 to the owners of the Hacienda 'Estanzuela' for the land which they occupied at Sangley Point, the first named for the year 1877 and the last named for the year 1893; that the land occupied by defendant is but a small portion of the land claimed, and that certain fishermen had set up at the said Point huts or cabins where they were in the habit of resting during the day and where they kept their fishing apparatus, one of the said fishermen having paid rent to plaintiffs' grantors for the land occupied by his cabin from 1886 to 1896.

"The defendant, for his part, called several witnesses who testified as to the existence of various buildings of the Navy erected at Sangley Point and upon the land called Cañacao close by the establishments which go by the name of Cañacao, and that the Spanish Navy, in the first place, and afterwards the American Navy have gone on occupying Sangley Point from the spot where the entrance to Cañacao is situated. Defendant further introduced Exhibits Nos. 1, 5, and 8.

"Defendant's Exhibit No. 1, dated October 6, 1881, is an opposition filed by María Bartola Franco against the concession for the establishment of a varadero, or dry dock, at Sangley Point, in which said opposition said María Bartola Franco sets forth: 'When I bought from its former owners the Hacienda of San Isidro Labrador or Estanzuela, including Sangley Point or Cañacao, the navy was already established therein, although at that time it did not possess the full extent of land which it enjoys today.'

"Exhibit No. 5, dated July 23, 1883, is a concession for the construction of a dry dock at Sangley Point, upon the spot now occupied by the Varadero de Manila, published in the Manila Gazette
69 of September 20, 1884, and which embodied the following provisions: 'The land granted shall not be used for any other purpose than that of a dry dock and its dependencies, said land to revert to the navy whenever the said dry dock shall cease operating as such. . . . All communication with said dry dock shall be had exclusively by sea, and land communication shall only be allowed in cases of evident necessity and upon permission obtained beforehand from the naval authorities. . . . The term of this

concession shall be ninety-nine years from the date of its grant, at the expiration of which period the dry dock and all its dependencies shall revert to the Government,'

"Exhibit No. 8, dated April 6, 1873, is an official report of Don José Montojo, officer of the Spanish Navy, and at that time general commandant of the arsenal at Cavite, now deceased, in which he sets forth the following: 'On September 19, 1881, Doña María Bartola Franco, then a resident of Cavite, now deceased, presented a memorial to the general commandant of the naval station, explaining that it was not her intention to claim the lands upon which are situated the various outhouses of the navy used for the deposit of coal, upon which the hospital is erected, and barracks for the marines have recently been constructed, and upon which are various other buildings pertaining to the marine corps, but that, being aware that a private enterprise proposed to establish thereon a dry dock, she prayed that she should be declared to be the owner of part of the land occupied by the navy (marina); which said memorial was, in accordance with the opinion of the Ultimo Auditor de Marina, disallowed by decree of September 29, 1881. . . . The rights
70 of the navy to the lands whereon were situated their buildings, which latter were essential to the various services and necessities of the Government, were derived indubitably from the very nature and topographical situation of the land, situated as is the latter upon the sea shore, which rights are defined and governed by the general laws of the country which treat of the ownership of waters, their shores, beaches, maritime war zones, etc., etc.'

"Plaintiffs objected to the admission of these exhibits as being irrelevant in so far as No. 1 was concerned, and as to Nos. 5 and 8, for the reason that they were drawn up by officials acting in the interest of the defendant; but the court admitted them under the provisions of Art. 338 of the Code of Civil Procedure.

"The plaintiffs called the court's attention to the fact that many of the defendant's witnesses have been, and some are even now, in the employ of the arsenal at Cavite. It is difficult to produce witnesses better informed than those who have been working upon the land from their youth up; and, although the circumstance of their having been, or being actually, employed may give rise to a suspicion of partiality in the minds of plaintiffs, nevertheless such a suspicion is not a legal reason for declaring them incapable of telling the truth, particularly when, as is the case in the present instance, the falsity of their testimony has not been shown. Art. 383 of the Code of Civil Procedure at present in force, which enumerates the cases in which witnesses are incompetent to testify, does not set forth the reason alleged by the plaintiffs. Therefore, in the opinion of the court, the testimony of defendant's witnesses, together with the said exhibits, is sufficient to prove that said defendant and
71 his predecessors, the former Spanish Government, entered into possession of Sangley Point before the year 1852 and have continued in possession thereof during all the time that the same has been growing as a result of the action of the sea up to the present time.

"And this finding of the court with respect to the possession of defendant is also corroborated by Exhibit No. 4 of defendant and Exhibit 'CC' of plaintiffs.

"Defendant's Exhibit dated September 22, 1881, is a notice to the effect that a petition had been presented praying for a concession to construct a varadero or dry dock at Sangley Point, on the site now occupied by the Varadero de Manila, which said notice was published in the Manila Gazette of September 26, 1881, in accordance with the Law of Waters of 1866 (p. 3), and in which notice it was stated: that said land 'is at present devoted to the use of the navy and is situated between the hospital buildings and the ruins of the former machine shop.'

"Plaintiffs' Exhibit 'CC,' dated March 29, 1884, is a document by virtue of which the Rodríguez family waived in favor of the petitioner for the concession for the varadero all claims which the former might have on the land of the varadero, and in said document it is set forth: 'that no one excepting the Navy or the Government, which is occupying it, may allege or claim any right or title whatsoever to said land,' and in the same document the vendors bound themselves to protect the purchasers against all claimants except the navy or the Government, in regard to which latter they assumed no obligation whatsoever.

"The fact that the plaintiffs cleared the land in question in the months of December, 1900, and January and February, 1901, is no argument against the possession of the defendant, because
72 possession is not lost by adverse possession of three months only (Art. 460—Par. 4—Civil Code).

"The fact testified to by plaintiff's witnesses, that the defendant occupied but a small part of the land, is not an argument against the possession of the defendant, because, in order to possess a property, it is not necessary that its actual area should be completely occupied, it being sufficient that such property should be subject to the action of the will of the party who seeks to acquire its possession, the latter fact, in the present instance, being shown by the acts performed by the defendant (Art. 438, Civil Code).

"The fact that the aforesaid Alfaro, Aquino, and Ferrer paid rent to the Rodríguez family is not an argument against the possession of the defendant (1) because the two first named are referring to a piece of land which is situated near the Cañacao powder magazine and outside of the land in question, and (2) because although the alleged lessee Ferrer did actually occupy part of the beach, it was rather by consent of the naval authorities than by virtue of the contract, inasmuch as the party alleging himself to be the lessor did not take up the defense of the said Ferrer when the latter was ejected from the land by said authorities.

"The common and general knowledge and repute introduced as evidence by plaintiffs is not an argument against the possession of the defendant, because proof based upon general knowledge is not admissible to establish ownership or possession or to rebut proof already in the record, and, moreover, because, if such general repute

was introduced to prove boundaries, as plaintiffs allege (p. 40
73 of their closing argument), the boundaries are not the object of the question, but, on the contrary, the question is as to the possession of the land comprised between the varadero and the northerly end of Sangley Point.

"The entry of fishermen upon the land in question, and their remaining on the beach of Sangley Point for fishing purposes, is not an argument against the possession of the defendant, because such acts, far from constituting adverse possession, are but the natural consequence of the legal use of the waters, shores, and lands adjacent to the sea (Law 3, Title 28 of Partida III. and Art. 339 of the Civil Code.)

"As a result of the proofs introduced by both parties and of the admissions made by the plaintiffs as to the fact alleged in Paragraph 4 of the answer, the court finds and declares as proven in the present case the following facts:

"1. That the land in question has been formed by accessions and accretions occasioned by the action of the sea between the year 1811 and the date of the filing of the complaint herein (December 22, 1903), a certain number of additional meters appearing from year to year from the former date until the present time.

"2. That the defendant, in his official capacity of commandant of the arsenal of the United States at Cavite, and his predecessors under the late Spanish Government, have, since the year 1852, possessed as owners in the name of the Government the land called Cañacao up to Sangley Point, with the exception of the portion at present occupied by the varadero of Manila, and have been, and still
74 are, occupying said Sangley Point as the same has gone on increasing and advancing up to the present time, having erected thereon the buildings set forth in defendant's Exhibit No. 3.

"3. That the heirs of Doña Bartola Franco Rodríguez Vela, by virtue of the titles which they possess to the Hacienda of San Isidro Labrador or Estanzuela, sold the land in question in this suit,—which extends from the site now occupied by the varadero to Sangley Point,—to the plaintiffs herein by public writing of March 17, 1901, which was recorded or inscribed in the Register of Property of Cavite May 23, 1901, in so far as regards the two thirds of the land sold, and, as regards the remaining third, on May 5, 1902, the deed of transfer setting forth: that 'the vendors would not be answerable for the defense of the title and indemnity for the loss of that part of the land occupied by a coast battery,' and the purchasers accepting the transfer subject to whatever results might ensue from the present occupation of said battery by the forces of the American Government, as well as subject to such servitudes as may have been constituted thereon under the Spanish laws or under the laws at present in force.

Propositions of Law.

"The propositions of law submitted by the parties for the decision of the court in the present case are the following:

"1. *Are lands formed by accessions or accretions from the sea public property, or do they belong to the owners of adjacent lands?*

"2. *Have plaintiffs a sufficient title in law to recover from defendant the land in question in this suit?*

75 "I. The defense set up by defendant in Paragraph 4 of his answer to the complaint has raised the question as to whether or not the owners of lands adjoining or bounded by the sea have a right to accessions formed by the sea. The plaintiffs allege that the ownership of the land was transferred to them by the heirs of the Rodríguez family by virtue of their right of accession to any and everything which may have been added to the land, as was the piece of land in question. On the other hand, the defendant contends that land formed by the action of the waters of the sea is public property.

"As will be seen, the right of accession constitutes the essence of the whole controversy, or, as the plaintiffs state (p. 28 of their closing argument), the point relating to accretion is the vital question in the case at issue, and is, practically, the only question.

"Inasmuch as the parties are agreed as to the fact that said land was formed by alluvion between the years 1811 and 1903, it will be proper, in the first place, to determine what is the law applicable to the case.

"According to Art. 16 of the Civil Code, the law applicable to the case is the Law of Waters of 1866, which specially refers to and regulates the matter of accessions formed on the shores of the sea; but the Law of Waters of 1866 did not go into effect in the Philippine Islands until September, 1871, and, therefore, is applicable only to that portion of the land which has been gradually forming since the aforesaid date. It is necessary, therefore, to refer to the Laws of the Indies to find the provisions applicable to that other portion of the land formed before the Law of Waters was in

76 force. But, as the 'Compilation of the Laws of the Kingdoms of the Indies' contains no provision in regard to this subject, the code of the 'Siete Partidas' must be applied, in accordance with the provision contained in Book 2, Title I., Law 2 of the said Compilation,—which said provision reads as follows: 'that the laws of Castile shall be observed whenever the point at issue is not covered by the Laws of the Indies. . . . We hereby order and decree that in all cases, matters, and lawsuits in which the law and the procedure to be followed have not been decided or declared by the laws of this compilation or by decree, prohibitions, or orders made for purposes of application in the Indies and not revoked, and by those made and issued by our order, the laws of our kingdom of Castile shall be observed, in accordance with the law called 'de Toro,' both as regards the presentation or trial and the determination and decision of such cases, matters, and suits and the method and order of such presentation or trial.'

"Now the code of the 'Siete Partidas,' in Law 26, Title 28 of Partida 3, provides that: 'all that which rivers take away from persons little by little, in such manner that the amount of the decrease cannot be ascertained owing to the fact that such decrease was not effected by the united action of such rivers, shall accrue to the owners of the property on which it is deposited, and those from whom the same is taken shall have no right or recourse in the premises.'

"This law is embodied in our Civil Code in the provisions treating of the right of alluvion of proprietors whose lands are bounded by rivers, and it is the same right which is recognized in all codes with more or less limitations.

77 "The authors Amandi and Escriche, cited by plaintiffs, in deciding this question affirmatively, base their reasoning, undoubtedly, upon the principles underlying the said Law of the 'Partidas.' The court, however, is of opinion that the deduction is not rigorously drawn, inasmuch as the position of a proprietor of land bounded by rivers and that of an owner of lands adjacent to the sea are not entirely similar, and that alluvion upon the shores of the sea is subject to Laws 3 and 4 of Title 28 of 'Partida' 3.

"Law 3 reads as follows: 'What are the things which belong in common to all men? The things which belong in common to all men who live in this world are the following: "air, rain water, the sea, and its shore." '

"Law 4 of the same title and 'partida' states: . . . 'and is called sea shore that strip of land to whose highest point the sea water ascends, covering the same, throughout the entire year, whether in winter or in summer.'

"Taking the definition of shore as given in Law 4, which agrees with the definition of beach (playa), as given in the Law of Waters, it is evident that between the adjacent land and the sea there is a certain strip of low land which is called shore or beach, and this is not the case with lands bounded by or adjacent to rivers. Upon this hypothesis the court believes that the beach (playa) is susceptible of accession, and, if it be true that the accessory follows the principal, the beach itself being public property, according to Law 3, it necessarily follows that accretions thereto must likewise be public property. This is the opinion which influenced Gutiérrez when, in his fundamental studies of the Spanish civil law, Title 2, pp.

78 92-93, in commenting upon Article 2 of the Law of Ports of 1880, he says: 'Upon the principle that the accessory follows the principal it is declared with rigorous logic in the provision in question that accessions to a beach become public property. Lands gained from the sea become the property of the State, and should the State alienate them, the owners of the adjacent lands shall have the right to redeem them at the price paid therefor.'

"The opinion of the court is supported by judgments of the Supreme Tribunal of Spain dated April 30 and May 10, 1863, which are interpretative of the aforesaid laws. According to these judgments (sentencias), the government may give in lease or emphyteusis all lands comprised in the beach or shore of the sea, and may grant

concessions of lands gained from the sea, making, for the purpose, special rules which grant and create rights of exclusive possession and use.

"The opinion of the court is also corroborated by the judgment rendered in the case of Mrs. Catherine Zeller, Widow, *vs.* Southern Yacht Club, 34 La. Ann. 837. The court below sustained the exception of the defendant based upon the ground that there was no right of property in accessions or accretions formed on the shore of Lake Pontchartrain, for the reason that said lake is an arm of the sea. The Supreme Court of Louisiana affirmed the judgment appealed from, for the following, among other, reasons: 'That the only right recognized under our law to accretions as property refers to such accretions as are formed in rivers and brooks, and that there is no recognition whatsoever of any right of property therein when the same are formed upon the shores of lakes, bays, arms of
79 the sea, or other large masses of water, and that the methods or modes of acquiring a right of property in such cases are limited to those expressly prescribed by law, and cannot be extended by implication.'

"In regard to the accretion formed since 1871, the law governing in the Philippine Islands is the Law of Waters of 1866. Under this law, should the owners of land adjacent to the sea enjoy the right of alluvion? Do they become owners of the accretions by the mere fact of the latter having been added to their property?

"The court is inclined to think not. But such owners may obtain from the Government a concession of such accretion subject to the conditions prescribed in the same law.

"According to Article 4 of this law: 'Lands added to the beach by accessions and accretions occasioned by the sea are public property. Whenever they cease to be in direct contact with the waters of the sea, or are no longer necessary for purposes of public utility or for the establishment of particular industries or for coast-guard service, the government shall declare them to be the property of the owners of the adjacent lands, increasing the extent of the latter.' From an analysis of the meaning and scope of this article, the plaintiffs conclude that it is the duty of the government *to confirm the title already possessed by such owners.* The court does not share this opinion. Paragraph 2 of said article, upon which plaintiffs base their contention, sets forth the conditions under which concessions of the accretions formed by the sea must be made by the Government to private individuals. These conditions are: (1) That they be not in actual contact with the waters of the sea; that they
80 be not necessary for purposes of public utility, nor for the establishment of special industries, nor for the coast guard service; and (2) A declaration by the government in favor of the owners of the contiguous lands.

"And it is to be noted that this provision of the law is based upon the presumption that such accretions are necessary for the purposes of public utility or for the establishment of special industries or for the coast guard service, and, for this reason, it states: 'Whenever they cease to be in direct contact with the sea, etc.' He who denies

a presumption of law must produce proofs as against such presumption, and, therefore, the owners of lands adjacent to the sea must first show the government that such accretions are not necessary for the purposes set forth in the said law, in order to have the government make the declaration of ownership in their favor. The government, under the conditions prescribed, shall declare (says the law) that lands added to the beach by accessions or accretions occasioned by the sea belong to the owners of the adjacent properties; hence, before such declaration, said owners have no right of property over said lands, possess no title thereto; otherwise, such a declaration would be utterly idle and useless.

"So long as private individuals obtain no concession from the government, in accordance with Paragraph 1 of said Article 4, accessions and accretions occasioned by the sea are public property.

"Plaintiffs cite Articles 8, 9, and 10, concluding therefrom: 'That lands of private individuals and adjacent to the sea must advance in the same measure as the sea withdraws, and that, according to the theory of the Law of Waters, the owners of lands ad-
81 jacent to the sea become likewise the owners of the increase occasioned by alluvion.'

"Said articles of the Law of Waters are:

'8. 'Lands adjacent to the sea are subject to servitudes of salvage and coast guard.

"9. 'The servitude of salvage comprises twenty meters of land shorewards starting from the interior limit of the beach, and public use of said servitude shall be had in cases of shipwreck for the purposes of the salvage and deposit of the remnants of the shipwrecked vassels and the effects and cargoes therein contained. Fishing barks may also seek shelter in said twenty-meter zone whenever obliged thereto by the state of the sea, and deposit thereupon whatever effects they may carry, provided no damage is thereby caused to the property. This littoral land zone, or salvage zone, shall advance in proportion as the sea withdraws and shall withdraw in proportion as the sea advances, because it must always be adjacent to the beach or shore.'

"Article 10 states: 'The coast guard servitude consists in the obligation of leaving open a passage which shall not exceed six meters in width and which shall be marked out by the Public Administration. This passage shall be within the littoral land zone referred to in the preceding article.'

"That which, in the opinion of the court, is to be inferred rigorously from the said articles is that whenever the littoral land or salvage zone has advanced by reason of the withdrawal of the sea, then there will have been formed a certain area or extent of land between the lines of the former and the new beach, or, in other words, an intermediate space between the sea and the land
82 which formerly was immediately adjacent to the sea, which strip so formed is precisely that which the law declares to be public property. If, as plaintiffs allege, all lands belonging to private individuals and adjacent to the sea advance or grow in proportion as the sea withdraws, and the proprietors thereof also

become owners of the alluvion thereby created, then and in that case what is the accretion which the law declares to be public property? In such case, the object or purpose of the law would be lacking.

"It is true that the Commission appointed to draw up the Law of Waters, in explaining the bases of the provisions contained in the law as projected, expressed the opinion that lands adjacent to the sea or its shores should be entitled to profit by the right of alluvion, on the ground that the reasons of justice and convenience upon which is based the right of alluvion granted to the owners of shore lands are equally applicable to the case under discussion; but, upon the discussion of the project, said opinion was modified in the manner set forth in Art. 4 of the law, which corresponds to Art. 7 of the said project. And herein is to be found the explanation of the difference existing between the reasons and the letter of the law, for, while the Commission was of opinion that properties or lands adjacent to the sea should be entitled to enjoy the right of alluvion, Article 4 provides that said right pertains to the public domain, but that such lands may become private property in the manner and subject to the conditions set forth in said article.

"Article 2 of the Law of Ports of 1880, commentated by Gutiérrez, as hereinbefore remarked,—although said Law has not been extended to the Philippine Islands,—is in accord with Art. 4 of the Law of Waters in so far as it declares that accretions occasioned by the sea are public property, its provisions differing from the latter article only in so far as regards the method of transfer to private individuals.

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"From all of the foregoing it is to be inferred that by the code of the 'Siete Partidas,' as well as by the Law of Waters of August 13, 1866, accessions and accretions occasioned by the sea are public property.

"II. *Have the plaintiffs a valid title giving them the right to recover the land in question?*

"The title which is the basis of plaintiffs' claim is Exhibit 'J,' which is the contract of purchase and sale of the land in question executed in favor of said plaintiffs, in 1901, by the heirs of Doña Bartola Franco, and inscribed in the Register of Property on the 23rd day of May, 1901, and on the 5th day of March, 1902. In this title are mentioned the other titles which the vendors hold to the Hacienda de Estanzuela, including Sangley Point.

"It being once established that the lands formed by accessions or accretions from the sea, as in the present case, are public property, the only way in which they can become private property is by means of a concession from the government in accordance with the provisions of the Law of Waters. Exhibit 'J' does not set forth any direct title from the government nor from any grantee who derived title from the government in any way. The titles of the vendors mentioned in Exhibit 'J' do not refer to the land in question. In virtue of what right, therefore, did they sell the land to the plaintiffs? In virtue of the right of accession? It has already been

shown that the land in question was originally public prop-
84 erty.

"It is alleged that the plaintiffs acquired the property from certain persons who appear in the register as the owners thereof; but the proofs introduced by said plaintiffs show that the heirs of Doña Bartola Franco—the vendors of the land—do not appear in the register as being the owners of Sangley Point, as it is and as it is designated in the contract of 1901.

"From an examination of the title of the vendors it appears that the land inherited from Doña Bartola Franco by the Rodríguez family is that which the former purchased in 1852 from Don Antonio Iturralde, the latter, in turn, purchasing the same from Don Miguel Velez Escalante. What the area of the land purchased by Iturralde is does not appear in the deed; but in connection with the question of boundaries raised by a certain Jacinto Colis the same was determined by the survey of 1811, executed by Don Cándido Domínguez, surveyor, by virtue of Royal Decree of the Audiencia of Manila dated September 22, 1810. Subsequently one Fernández and others disputed the ownership of Iturralde to certain portions of Cañacao, then called Sangley Point, and, while the suit was pending, Iturralde sold the Hacienda of San Isidro Labrador to Doña Bartola Franco, *including the said Sangley Point in case they should win the suit;* that is to say, including the Point as the same was purchased by Iturralde from Escalante, which was that portion thereof which could validly be sold to Doña Bartola, in the event of the lawsuit being won as to certain portions of land comprised within the hacienda and the ownership whereof Fernández and others were then disputing. For the determination of the said lawsuit, it was neces-
sary to survey the said hacienda in 1856, and the result of
85 such survey appears in the report made by the Surveyors Santiago Arquiza and Vicente Trinidad, which is of the following tenor:

" 'That, while ratifying the report made by the Judge during the operation of said survey, attention is to be called to the fact that the differences noted in various parts of the hacienda are inconsiderable, inasmuch as they neither alter the direction of the lines nor affect the premises in question, as they have their origin at points distant from said premises; and they, therefore, state that, bearing in mind, as it is necessary to do, the above mentioned survey (that of 1811), it is evident: (1) that the plan annexed by Vela (Rodríguez) to the survey had in the year 11 (1811) is in accord with said survey; (2) that the land in question, called Sangley Point, is part of the Hacienda Estanzuela, inasmuch as it is situated within the limits of the latter; and (3) that all those portions of said hacienda which appear as having been gained in extent or lost by diminution have been so gained and lost by alluvion, as is evident from manifest indications and appears from the plan which clearly shows the same as well as the circumference, directions, measures, and most notable parts of the hacienda, both in so far as regards the survey of 1811 and that recently had.'

"The purpose of this survey was to rectify the survey of 1811, and to determine in this manner whether the lands in litigation between

Fernández and Bartola Franco were comprised within the Hacienda Estanzuela, and it appearing that they were so situated, said suit was decided in favor of Doña Bartola Franco by judgment rendered in 1856. The surveyors surrounded the land by means of lines (cordeladas) according to the courses as laid down in the survey
86 of 1811, and in the boundaries included some portions of land formed by alluvion and excluded others which had been inundated by the sea. By order of the Judge a plan of the hacienda was drawn up, and in Exhibit 'N' appears marked with a colored line the perimeter within which the limits of said hacienda were fixed. The plan, although it comprises the extremity of Sangley Point, does not mean, in the opinion of the court, that that part of the Point also belongs to the hacienda. It was not the purpose of the last survey to measure the entire extremity of the Point and to include it in the hacienda; but it was merely for the purpose of ascertaining whether the lands whose ownership was disputed by Fernández *et al.* were or were not within the limits of the hacienda as the same was surveyed and bounded in 1811. As a proof of the fact that measurements were not taken in 1856 to the extreme end of the Point, it appears that outside the colored lines in Exhibit 'N,' which mark the measurements made, there are no other measurements which show that the whole of the extreme end of the Point was included within the circumvallation.

"After the ratification of the survey of 1811, which said ratification took place in 1856, it does not appear anywhere in any of the documents filed that the heirs of Doña Bartola Franco endeavored to prove the existence in the Register of any accession or accretion whatsoever, outside of what is included in the survey of 1856.

"The possessory information refers, according to the witnesses who testified therein, to the Hacienda Estanzuela, according to the titles and plans in the possession of the Rodríguez family, or, in other words the hacienda which Doña Bartola purchased from Iturralde. If therefore, this petition, together with the other
87 documents aforesaid, is that which was recorded in the Registry of Property, we must necessarily come to the conclusion that the land recorded is only the land which was surveyed in 1811, which said survey was ratified in 1856, and not the whole of the extreme end of the Point as it existed in the said year 1856.

"In the first clause of Exhibit 'J,' it is set forth that the area of the property is that which is shown by the measurements taken by the Surveyor Don Cándido Domínguez in 1811, set forth and described in the respective entries in the Register of Property, and which are referred to in the following paragraph. In the following paragraph, which is the second clause of the contract, the Registrar (Exhibit 'K') makes the description in accordance with the survey of 1811. Therefore, the area of the property inscribed in favor of the Rodríguez family is that which is set forth in the proceedings of the survey held in 1811. In clause fifth the vendors describe and give the boundaries of a piece of land which is without the limits of the land surveyed in 1856 and, therefore, not inscribed in the register.

"That the line of the shore toward the extreme end of Sangley Point formed the boundaries of the hacienda between the years 1811 and 1903; that during that time the shore line to the extreme end of Sangley Point has advanced considerably in proportion as new land was formed by effects of accretion; and that at all times up to the present the land situated within said shore line has been known as Sangley Point; from this it is not to be inferred that, having once been inscribed in favor of the heirs of Rodríguez said Sangley
88 Point, as surveyed and bounded in 1811, was, as a matter of fact, inscribed in favor of said heirs as it appears bounded in the contract of 1901. The effects of inscription cannot extend to more than that which really appears to be inscribed in the register, and if there is alluvion, as is admitted in the present cause, the owner who believes himself to have a good title thereto must prove its existence in the register itself. Galindo and Escosura, in their commentaries upon the mortgage law, state, in speaking of the inscription of natural accessions, Vol. I, p. 329: 'Difficulties are not lacking in the matter of the inscription of natural accessions. In such as are caused by the force of rivers or the increase therefrom, it would appear to be necessary that there should be had a writing giving assent on the part of the owner of the property to which the segregated portion has been joined, or a judicial declaration, as the case may be. Or, at least, the alluvion will have to be justified by a new survey and a statement of experts drawn up in the form of a public document.'

"The fact that the contract of sale executed by the heirs of the Rodríguez family in favor of plaintiffs (Ker & Co.), Exhibit 'J,' was inscribed in the Register of Property raises a legal presumption that, upon the contract being inscribed in 1901, the right of the vendors must likewise have been inscribed, because it is to be supposed that they complied with the formalities of law (Art. 334, No. 31, of the Code of Civil Procedure); but the Mortgage Law admits the possibility of the contrary, and, therefore, such a presumption,—the same being *juris tantum*,—cannot exist in the face of proof which destroys the truth of the facts upon which such presumption is based.

89 "It being established—as the court believes it to be,—that the inscribed title of those who sold the land to the plaintiffs refers only to Sangley Point as the same was bounded in 1811, and there appearing in favor of the former no inscription as to the lands existing without the boundaries as laid down in 1856, the proposition that the plaintiffs purchased the land from persons who appear as owners thereof in the register is not supported by the proofs. If the heirs of Bartola Franco, upon making the transfer in favor of plaintiffs, based themselves upon the title which they held to Sangley Point, it is evident that they could not so transfer by virtue of said title more than what appeared in the register.

"As the title by virtue of which an action in ejectment must be exercised must conform to all the legal requisites, it is necessary that, in the case of public property, the party claiming should show in his title a grant from the Government either to himself directly

or to other grantees. The Supreme Tribunal of Spain, in a judgfent (sentencia) of October 21, 1880, stated that 'A deed of sale, though it may have all necessary force and validity for the purposes of establishing that such contract was executed by the parties thereto, is insufficient to establish title in the vendors, and, more particularly, to establish ownership of the same as against a third party who has possessed the property for more than thirty years and who is admitted to have performed, during such period of time, acts of ownership, although such acts may be qualified as abusive and arbitrary, but as against which there cannot be opposed other and more legitimate acts performed by the vendors or their grantors or by the
90 purchaser or those deriving from the latter, none of whom has appeared as owner or possessor of the land in any real estate or taxation lists.' The same Supreme Tribunal, in a judgment of January 11, 1885, lays down the doctrine that, 'Inscription in the Register of Property is not, of itself, a title right, but is merely corroboration and guarantee of such rights as require such inscription, and as such must be taken into account when it is a question of third persons by virtue of its own nature and extent, and not by virtue of the terms, more or less vague, of the register;' and, among several other judgments, that of October 21, 1880, has likewise held that, 'Under Law 28, Title 2, Partida 3, when he who claims a thing as his own cannot prove that the ownership thereof belongs to him, the defendant always retains possession, even though he establish no right to retain it.' And the Supreme Court of these Islands, in a judgment of April 22, 1904, in the case entitled 'La Compañía General de Tabacos contra Miguel Tupino y otros,' says: 'That in a case for the recovery of property the plaintiff who claims the restitution of lands occupied by others must found his claim upon his own right rather than upon the defects in the title of the defendant, and the party who alleges ownership is the one upon whom rests the onus of proving it.'

"As to the indemnity for damages prayed for by plaintiffs, it is sufficient to say that, though the amount of the damages claimed from the defendant be proved, there is no fault on the part of the latter, and, therefore, a condemnation in damages is not proper in view of the doctrines laid down in the judgments of the Tribunal Supremo of Spain of date March 10, 1893, and April 9, 1898, which doctrines are equally sustained in the decisions cited by the defendant at page 41 of his argument.

91 "Sufficient has been said upon the two questions discussed to render it unnecessary to discuss the defense of prescription alleged by defendant, because, the land in question being public property, it is not necessary that the Government prescribe it, because no one prescribes that which is already his.

"To resume, the court finds the following conclusions of law:

"1. That the land in litigation formed by deposits and accretions from the sea is public property, and can only become private property in the manner and subject to the conditions established by law.

"2. That as no title from the Government or its grantees is set forth in the contract of sale upon which plaintiffs base their claim,

said contract is insufficient to entitle plaintiffs to claim restitution of the land from the defendant, whose right therein is guaranteed by law and antedates the inscription of said contract.

"3. That the defendant possessing the land in good faith and in the fulfillment of his official duties, he is under no obligation to pay any damages whatsoever.

"Wherefore, the court is of opinion that the defendant should be absolved from the complaint, with costs against plaintiffs.

"And it is so ordered.

"IGNACIO VILLAMOR,
"Judge of the Sixth Judicial District."

To this decision the plaintiff duly excepted.

92 On September 20, 1904, and within the term of the court session in which the judgment was rendered, the plaintiff filed a motion praying for the withdrawal of the judgment and the holding of a new trial, on the ground that the findings of fact set forth in the judgment are clearly and manifestly against the weight of the evidence, and that the said judgment is contrary to law.

This motion was overruled, and the plaintiff duly excepted.

On September 27, 1904, the plaintiff duly notified the Court of its intention to perfect a bill of exceptions.

The plaintiff specifies, as a part of this bill of exceptions not to be printed, in accordance with the provisions of Act No. 1123, all the evidence, both verbal and documentary, introduced in the present cause.

By a verbal stipulation of both parties, the period for the preparation of this bill of exceptions has been extended to the present date. The plaintiff now presents the foregoing bill of exceptions, and prays the Court that the same be approved, certified, and signed.

Manila, October 28, 1904.

(Signed) PILLSBURY & SUTRO,
Attorneys for Plaintiff.

93 UNITED STATES OF AMERICA,
Philippine Islands:

Court of First Instance of Cavite.

Civil Case No. 179.

Replevin.

KER & COMPANY, Plaintiff,
versus
A. R. COUDEN, Defendant.

In the Court of First Instance of Cavite, December 3, 1904.

Present: The Honorable Judge of the District; Attorney W. H. Lawrence, for the plaintiff; Attorney F. Salas, for the defendant.

Upon the opening of the session by the Sheriff, the Court heard the parties; after arguing upon the approval of the bill of exceptions,

the defendant asked that there be added to the bill of exceptions of the plaintiff the objections filed by the defendant. The plaintiff replied, stating that the bill of exceptions should contain only the exceptions of the appellant, and, after hearing the parties, the Judge agreed that there be added as a part of the bill of exceptions the grounds alleged by the defendant for his objections to the presentation of the exhibits of the plaintiff, as shown in the first paragraph of page 32 of the Spanish record.

94 The defendant excepted to this decision; whereupon the session was closed, the attorneys signing hereto after the Judge, to which I certify.—Signed—Ignacio Villamor—Judge—For the Attorney General—Fernando Salas—W. H. Lawrence—Attorney for appellant—Ladislao Diwa.

Addition to the Bill of Exceptions, in Accordance with the Agreement of December 3.

First paragraph of page 32 (Spanish record):

Mr. GOLDSBOROUGH: "The attorney for the defendant wishes to reserve the same objection to the memorandum of reinscription which he made to exhibit 'K.' It appearing that the record of the former trial does not show in detail the grounds of the objections presented by the defendant to the exhibits of the plaintiffs, the attorney for the defendant prays that it be noted on the record that the exhibits of the plaintiffs, 'D,' 'E' and 'F,' were opposed by the defendant on the grounds that they were impertinent and did not refer to the land in question; also exhibits 'G,' 'H,' 'H' and 'L,' as impertinent, because they do not show that they refer to the land in question; exhibits 'L' and 'LL,' which were filed in proceedings among persons in which the defendant was not included, and therefore their presentation is improper as evidence against the defendant; and exhibits 'I' and 'J,' as impertinent, inasmuch as it has not been shown that the vendors to Ker & Company had any right to the said land; and that said exhibits were admitted subject to said objections."

95 Court of First Instance of Cavite, December Third, Nineteen Hundred and Four.

I hereby certify that the foregoing bill of exceptions is correct and that it contains all the points essential to a complete comprehension of the errors assigned. The Clerk of the Court of First Instance of Cavite is ordered to make a complete transcript of the evidence for said bill of exceptions, at the petition of the appellant, and upon payment of the corresponding fees, in order that said bill of exceptions be forwarded to the Supreme Court within sixty days from this date, for the purpose of considering and correcting the errors supposed to have been committed.

(Signed) IGNACIO VILLAMOR,
Judge of the Sixth District.

UNITED STATES OF AMERICA,
Philippine Islands:

Court of First Instance of the Province of Cavite, P. I., Sixth District.

I, Ladislao Diwa, Clerk of this Court, hereby certify that I have examined the document hereto attached, to wit, the bill of exceptions in civil case No. 179, regarding the replevin of Sangley Point, between Ker & Company, plaintiff, and Mr. A. R. Couden, defendant, which is forwarded to the Supreme Court with the original record in English and Spanish and all the other evidence introduced in the trial, for the purpose of the appeal filed by the plaintiff.

96 And that I have compared it with its original on file in my office, of which it is a true and correct copy.

And in order that it may thus appear, I have signed this certificate and have sealed it with the official seal of this Court, this 16th day of January, 1905.

LADISLAO DIWA, *Clerk.*

That thereafter, briefs on behalf of said plaintiff and said defendant having been regularly filed in said cause, said cause was set for trial in said Supreme Court, and on the 22nd day of November, 1906, the Court, being fully advised in the premises, rendered a decision and judgment therein which reads in words and figures as follows, to wit:

"Trátase aquí de un juicio sobre reivindicación de cierto terreno situado en la Provincia de Cavite, descrito en la demanda en la siguiente forma:

" 'Una cierta parcela de terreno, en su totalidad, constituyendo una parte de lo conocido por Punta Sangley, sito y estando dentro del distrito municipal de San Roque, Provincia de Cavite, lindante al Norte con la bahía de Manila; al Este con la bahía de Manila y la ensenada de Cañacao; al sur con la bahía de Manila, la ensenada de Cañacao, y la linde nordestal del terreno del Varadero de Manila, y, por una prolongación directa de la referida linde nordestal, en línea recta al Noroeste hasta la bahía de Manila; y al Oeste, con la referida linde nordestal del mencionado Varadero, y por la referida prolongación de la misma, y por la bahía de Manila.'

97 "El demandado ocupa el terreno arriba descrito como comandante de la Estación Naval de los Estados Unidos en Cavite y alega que los Estados Unidos son dueños del mismo.

"Los demandantes fundan su derecho de propiedad en ciertos títulos traslativos de dominio otorgados á su favor en los años 1901 y 1902 por los dueños de la titulada 'Hacienda de la Estanzuela' ó 'San Isidro Labrador.' El terreno en cuestión consiste de una punta arenosa cubierta de arbustos y malezas como de quince hectáreas de superficie, formada por accesión durante los últimos cien años. En 1811 no existía ninguna de las parcelas aquí en controversia. En 1856 se había formado ya parte de la misma, tal vez como una cuarta parte de la extensión superficie actual.

"Lo que antecede lo hemos tomado del alegato de los apelantes. El demandado, además de negar ye directamente ó según informes y creencia propia, los hechos relacionados en la demanda invocó la ley de prescripción é interpuso además la siguiente defensa:

"'4. Y, por vía de defensa especial, expone el demandado que dicha porción de la mencionada Punta es terreno hecho que ha venido appregándose á la línea de la antigua playa mediante acrecentamientos y depósitos causados por la acción de la mar, y es parte del dominio público del Gobierno.'

"Durante el juicio los demandantes admitieron como cierto lo siguiente:

"'Sr. SUTRO: Los demandantes alegan como defensa especial en el párrafo cuarto de la contestación que la citada porción del expresado terreno se formó por accesiones y aterramientos ocasionados por acción del mar; y esta alegación de defensa especial los
98 demandantes la admiten como cierta con la aclaración, sin embargo, de que no determinan la fecha en que comenzó la acción, extremo que esperan que el demandado pruebe.'

"El Juez de Primera Instancia, en vista de esta admisión, declaró que el terreno así ganado al mar era del dominio público y pertenecía al estado, y dictó sentencia en favor del demandado, diciendo que, según su interpretación de la ley, no era preciso resolver las demás cuestiones planteadas, sobre todo la relativa á la excepción de prescripción consignada como defensa en la contestación.

"Los demandantes, aquí apelantes, señalan un número de errores referentes, los más, á la admisión y no admisión de las pruebas aducidas acerca de la cuestión de prescripción. Los apelantes dicen en su alegato que: 'Desde luego, si el terreno formado por la acción del mar pasa á ser *ipso facto* del dominio público, la cuestión de prescripción pierde toda importancia y no hay para qué discutirla;' y añade: 'Es evidente que la cuestión' primordial aquí es esta: los terrenos que se unen por la acción del mar á las fincas de particulares han de considerarse como incorporados á éstas por accesión ó como de dominio público? 'Esta ha sido cinsiderada por los demandantes, por el demandado, así como por el Juez *a quo* como la cuestión de mayor importancia en este pleito, y su resolución, decidirá el asunto.'

"Á nuestro juicio la sentencia apelada debe ser confirmada bajo el fundamento consignado en la decisión del Juez, y por tanto, la única cuestión que tenemos que considerar es la ya enunciada en los precisos términos en que aparece aquí transcrita del alegato de los apelantes.

99 "En 1811 se practicó la medición de la hacienda. Entonces no existía parte alguna del terreno aquí cuestionado. En 1856 se practicó otra medición según la cual parte de este terreno se había ya formado.

"La ley de Aguas de 13 de Junio de 1879, hoy vigente en la Península, no se hizo nunca extensiva á Filipinas. Por Real Decreto de 8 de Agosto de 1866, la Ley de Aguas de 3 de Agosto de 1866 fué comunicada á estas Islas. El *cúmplase* del Gobernador-General no fué puesto en este Decreto hasta el 21 de Septiembre de 1871.

Fué publicado en la 'Gaceta de Manila' en 24 de Septiembre de 1871 y se declaró vigente aquí dicha Ley. Habiéndose suscitado dudas acerca de si la Ley había sido comunicada á estas Islas en debida forma ó no, fueron resueltas aquellas por el Real Decreto de 8 de Abril de 1873, promulgado en 12 de Julio de 1873. Se declaró vigente la Ley en el Archipiélago. De manera que en cuanto al terreno formado desde 1871 los derechos de las partes deben regirse por la Ley de Aguas de 1866, y las disposiciones de nuestro Código Civil actual. El artículo 1 de dicha Ley dice en parte lo siguiente:

" 'Son del dominio nacional y uso público: . . .

" '3.o. Las Playas.—Se entiende por playa el espacio que alternativamente cubren y descubren las aguas en el movimiento de la marea. Forma su límite interior ó terrestre la línea hasta donde llegan las más altas mareas y equinocciales. Donde no fueron sensibles las mareas, empieza la playa por la parte de tierra en la línea á donde llegan las aguas en las tormentas ó temporles ordinarios.'

100 "Los artículos 4 y 5 dicen:

" 'Art. 4. Son del dominio públicio los terrenos que se unen á las playas por las accesiones y aterramientos que ocasione el mar. Cuando ya no los bañen las aguas del mar, ni sean necesarios para los objetos de utilidad pública, ni para el establecimiento de especiales industrias, ni para el servicio de vigilancia, el Gobierno los declarará propiedad de los dueños de las fincas colindantes en aumento de ellas.

" 'Art. 5. Los terrenos ganados al mar por consecuencia de obras construidas por el Estado ó por las provincias, pueblos ó particulares competentemente autorizados, serán de propiedad de quien hubiere construido las obras, á no haberse establecido otra cosa en la autorización.'

"Al caso de autos le alcanza de lleno la primera parte del citado artículo 4. Se declara expresamente en ella que los terrenos formados del modo que se formó el que aquí nos ocupa son del dominio público. Nada podía ser más explícito y los efectos de esta declaración no están en modo alguno limitados por lo demás contenido en el mismo artículo. La pretensión de los apelantes de que esta segunda parte del artículo en cuestión indica que esos terrenos pertenecen á los dueños de las fincas colindantes y que la declaración de que se ha hecho mérito no viene más que á confirmar esa propiedad, es insostenible. Esto estaría en abierta contradicción con lo consignado en la primera parte del mismo artículo. La verdadera interpretación de dicho artículo es la de que cuando esos terrenos que pertenecen al Estado no sean necesarios para los objetos que allí se expresan, entonces el Gobierno los concederá á los dueños de las fincas colindantes en
101 aumento de ellas. Los apelantes no intentaron siquiera probar tal concesión en el caso que nos ocupa, y, en efecto, resulta evidente de lo actuado que las condiciones necesarias para que los dueños de las fincas colindantes tuviesen derecho á tal concesión jamás concurrieron en el presente caso, porque por mucho tiempo el terreno había sido utilizado por la Marina Española y ahora lo ocupa el

Gobierno actual como estación naval y obras que importan más de 500,000 pesos oro.

"El criterio de la comisión nombrada para redactar la Ley de 1866 acerca del particular, tal cual aparece indicado en la exposición de motivos de dicha Ley, pierde toda su fuerza cuando vemos, como hace observar el Procurador General, que ese criterio no fué adoptado por la Ley que por último se promulgó. (I Alcubilla, Dic. de Admin., 4.a edición, pág. 344, nota).

"Lo dispuesto en la misma Ley respecto de la servidumbre de salvamento y vigilancia de costas no es incompatible con la interpretación que hemos dado al artículo 4. La playa es siempre la misma, aunque ocupe sitios distintos en distintas épocas. Comprende siempre el espacio que cubren y descubren las aguas en el movimiento de la marea, pero puede, como ocurrió en el presente caso, cambiar con las accesiones ocasionadas por la acción de las aguas. La servidumbre de salvamento y la de vigilancia de costas deben guardar siempre la misma relación con la playa, pertenezca el terreno colindante con la playa al Estado ó á particulares. En el caso de autos la servidumbre de salvamento, después de algunos años, pesaba forzosamente sobre los terrenos públicos del Estado y no sobre las fincas de particulares colindantes con las playas.

102 "En cuanto al terreno formado antes de 1871 la ley de aplicación se encuentra en las Partidas cuyas disposiciones son aplicables, bajo las circumstancias, á un caso como éste. (Benedicto *vs.* de la Rama, 2 Gac. of 9, pág. 166.)

"La Ley 3, Título 28, Partida 3, dice en parte lo siguiente:

"'Ley III. Las cosas que comunalmente pertenescen a todas las criaturas que biuen en este mundo, son estas; el ayre, e las aguas de la lluuia, e el mar, e su ribera.'

"La Ley 4 del mismo Título dice en parte lo siguiente:

"'. . . e todo aquel lugar es llamado ribera de la mar, quanto se cubre del agua della quanto mas crece en todo el año, quier en tiempo del inuierno, o del verano.'

"La ley 6 del mismo Título, sin embargo, dice que las riberas de los ríos ó sean las zonas laterales de sus alveos que solamente son bañadas por las aguas en las crecidas que no causan inundación pertenecen á los dueños de los predios colindantes, y la Ley 24 del mismo Título dice que el terreno ganado por accesión de los ríos pertence, por lo general, á los dueños de los predios colindantes. No hay, sin embargo, disposición alguna de esta índole en cuanto á los terrenos que se unan á la playa por la acción del mar. En la Enciclopedia Española de Arrazola, publicada en 1849, se encuentra en la página 582 del tomo 2, lo siguiente:

"'No tiene lugar tampoco el derecho de aluvión en las desviaciones que hace el mar dejando en seco alguna parte de terreno immediata á los campos ó á la playa. La legislación francesa ha creido deber resolver este caso expresamente en el sentido expuesto; pero bastaría la consideración de que estos terrenos son considerados como dependencia del dominio público para opinar así en todos los

103 casos aunque no hubiera una disposición terminante.'

"En el asunto de Catherine Zeller *vs.* The Southern Yacht Club (34 La. Annual, 837), el Tribunal dijo, página 839:

"'El demandante, sin embargo, niega que el Lago Pontchartrain sea mar ó un brazo de mar, y por tanto alega que esta cuestión de accesión ó aluvión por la acción del mar, carece de aplicación al caso de autos. En cuanto á esto bastaría decir que el único derecho de accesión reconocido por nuestras leyes como modo de adquirir la propiedad, se limita á la producida por los ríos y aguas vivas; y que no se reconoce derecho de propiedad alguno de esta índole, cuando la accesión ocurre en lagos, bahías, brazos de mar ú otras grandes mazas de agua, y que los modos de adquirir la propiedad se limitan á los taxativamente establecidos por la ley y no pueden extenderse por deducciones.'

"Habiendo declarado expresamente las Partidas que las riberas de los ríos pertenecían á los dueños de los predios colindantes y que lo que se unía á dichas riberas por accesión pertenecía también á aquéllos, y habiendo declarado además en el mismo título que las playas eran de dominio público y no habiendo dicho nada acerca de que lo que se une á las playas por la acción del mar pertenecía á los dueños de los terrenos colindantes, tenemos forzosamente que inferir de aquí que no fué la intención de los autores de dicho cuerpo legal la de que los terrenos formados por la acción de las aguas fuesen considerados como de la propiedad de los dueños de las fincas colindantes. La regla general es la de que lo que se une por accesión pertenece al dueño de la cosa á que se halla unido. Haciendo aplicación de esta regla á las tierras que se unen á la orilla del mar por la acción de las aguas, resultaría que esta adición pertenecería al público,
104 y declaramos que con anterioridad al año 1871 las tierras formadas en este caso por la acción del mar no pertenecían á los cedentes de los demandantes dueños de los terrenos colindantes, sino al dominio público.

"Los demandantes se fundan también en el hecho de que en el año 1890 sus cedentes aparecían inscritos en el Registro de la Propiedad como dueños de un terreno lindante por el Norte con la bahía de Manila; por el Sur, con el Istmo de Dalahican y terrenos de la propiedad de José Bassa; por el Este, con la ensenada de Cañacao, un estero del pueblo de San Roque y la ensenada de Bacoor, y por el Oeste, con la bahía de Manila. Los terrenos en cuestión están ahora comprendidos dentro de esos linderos y su mayor parte debió haber estado comprendida dentro de esos mismos linderos en el año 1890 en que se practicó la inscripción.

"El terreno aquí en cuestión no pertenecía á las personas á cuyo nombre fué inscrito cuando se practicó esta inscripción. Por el contrario pertenecía al Estado. Según el artículo 33 de la Ley Hipotecaria la inscripción de este terreno á nombre de los cedentes de los demandantes no pudo privar al Estado de sus derechos respecto del mismo. (Merchant contra Lafuente, 4 Gac. Of., 247). Ni tampoco puede privarse al Estado así de sus derechos según el artículo 34 de dicha Ley. Los demandantes, cuando compraron el terreno, conocían la situación que ocupaba éste con relación al mar. Estaban en la obligación de saber que las tierras que el mar hubiese agregado á los terrenos entonces existentes no pertenecían á los dueños de las fincas colindantes, sino al Estado. Estaban obligados á saber que los dueños de los terrenos colindantes no tenían derecho alguno á

enajenar las tierras que se habían unido á sus fincas por la acción del mar.

105 "Además la misma inscripción les decía expresamente que parte del terreno se había formado como queda dicho. Hay, en efecto, dos descripciones en la inscripción que no son compatibles entre sí. La primera es la trascrita anteriormente. Mas después de consignar ésta el registrador procede á describir el terreno tal cual aparecía de la medición de 1811, haciendo constar en detalles los límites y rumbos del mismo con arreglo á dicha medición. Dentro de esta última descripción no resultaría comprendido el terreno aquí en cuestión. El registrador hace constar además que en 1856 se practicó otra medición 'incluyendo algunos terrenos que habían sido ganados por aluvión y excluyendo otros que habían sido mermados por el mar, advirtiéndose en esta segundas diligencias que las diferencias notadas en varias partes de la finca son de poca consideración puesto que no alteran la dirección de los rumbos ni los límites.

"No se hace constar en el registro con toda precisión cuál fue el objeto de esta segunda medición puesto que su único fin fué el de rectificar la medición ya practicada en 1811 al objeto de averiguar si ciertas parcelas de terreno entonces en controversia estaban situadas dentro ó fuera de los límites consignados en aquella medición. Mas, dejando á un lado esta cuestión, es evidente que la inscripción en el registro era para los demandantes una advertencia expresa de que parte de las tierras inscritas se habían formado por la acción del mar y que era, por tanto, de dominio público.

"No les ampara por tanto el precepto del artículo 34 de la Ley Hipotecaria. Del Registro no constaba que sus cedentes tuviesen derecho á enajenar este terreno. Por el contrario constaba expresamente que no tenían derecho á enajenarlo si es que se había formado por la acción del mar.

106 "Habiendo llegado á la conclusión de que el terreno en cuestión ha sido siempre de la propiedad del Estado, no es preciso resolver aquí la cuestión de prescripción ni las demás cuestiones planteadas por los varios motivos de recurso invocados en el alegato de los apelantes.

"Confirmamos la sentencia del Juzgado inferior con las costas de esta instancia á los apelantes. Y trascurridos veinte días dictese sentencia á tenor de lo resuelto y devuélvase oportunamente el asunto al Juzgado de su procedencia á los efectos á que en derecho hubiere lugar. Así se ordena.

"Arellano, Pres., Torres, Mapa, Johnson, Carson, y Tracey, MM., están conformes.

"Se confirma la sentencia."

Which said judgment, being rendered into English, reads as follows, to wit:

"WILLARD, *J.*:

"This is an action of ejectment to recover certain land in the Province of Cavite, described in the complaint as follows:

" 'A parcel of land constituting a part of the tract known as Sang-

ley Point, situated within the municipal limits of San Roque, Province of Cavite, bounded on the north by Manila Bay; on the east by Manila Bay and Cañacao Bay; on the south by Manila Bay, Cañacao Bay, the northeast boundary of the property of the Varadero of Manila and the prolongation of the said northeast line toward the northwest to Manila Bay; and on the west by the said northeast boundary of the said Varadero and by the said prolongation of the same and by Manila Bay.'

107 "The defendant is in possession of the above described land as commandant of the Cavite Naval Station of the United States and sets up title in the United States.

"The plaintiff claims title by conveyance made in 1901 and 1902 by the owners of the so-called 'Hacienda de la Estanzuela' or 'San Isidro Labrador.' The land consists of a sandy point covered with weeds and brush (about 15 hectares in extent) which has been formed in the last one hundred years by accretion. In 1811 none of the parcel in controversy existed. In 1856 a part of it had been formed, perhaps one-fourth of the present area.

"The foregoing statement is taken from the brief of the appellants. The defendants, in addition to a denial, either direct or upon information and belief, of the facts stated in the complaint, pleaded the statute of limitations and also the following general defense:

" '4. For special defense the defendant says, that said portion of said Point is made land added to the old shore line by accretions and deposits caused by the action of the sea and is part of the public domain of the Government.'

"At the trial of the case the plaintiffs made the following admission:

" 'Mr. SUTRO: The plaintiffs allege as special defense, in paragraph four of the answer, that said portion of said land was formed by lands aggregated to the line of shore by deposits and accretion caused by action of the sea; and this allegation of special defense is admitted as true by the plaintiffs with the explanation that we do not determine the date of the commencement of the accretion, which we expect the defendant shall do.'

108 "The court below, in view of this admission, decided that the land thus gained from the sea was public property and belonged to the State, and entered judgment for the defendant, stating that it was not necessary in the view that it took of the law to determine the other questions in the case, and particularly the defense of the statute of limitations which had been set up in the answer.

"The plaintiffs—appellants in this court—make a number of assignments of error relating, most of them, to the admission and rejection of evidence offered on the subject of the statute of limitations. The appellants say in their brief that:

" 'Of course, if land formed by the action of the sea is *ipso facto* public domain, the question of prescription loses its interest and need not be considered.'

"And again:

" 'It is apparent that the vital question in the case is this: Do

new lands added by action of the sea to private estates become, by accession, incorporated in such estates, or are they public domain? This has been accepted by plaintiffs, defendant, and the trial court as the vital issue in this cause, and its determination will decide the case.'

"We think that the judgment of the court below should be affirmed upon the ground upon which that court based its decision, and therefore the only question which we should consider is the one above referred to as quoted from the appellants' brief.

"A survey of the hacienda was made in 1811. At that time no part of the land here in question existed. In 1856 another
109 survey was made and from that survey it appears that a part of this land had then been formed.

"The Law of Waters of June 13, 1879, now in force in the Peninsula, was never extended to the Philippines. By a Royal Order of August 8, 1866, the Law of Waters of August 3, 1866, was sent here. The *cúmplase* (order of compliance) of the Governor-General was not attached to this royal order until September 21, 1871. It was published in the 'Gaceta de Manila' (Manila Gazette) on September 24, 1871, and the law declared to be in force here. Doubts having arisen as to whether the law was communicated to the Islands in the proper way, they were settled by the royal order of April 8, 1873, which was promulgated on July 12, 1873. The law was declared to be in force in the Archipelago. As to the land formed since 1871, then, the rights of the parties must be determined with reference to the Law of Waters of 1866, and the provisions contained in the present Civil Code. Article 1 of that law is in part as follows:

" 'The following belong to the public domain and are for public use:

" '3. The Seashores.—By seashores is understood the area which is alternately covered and uncovered by the waters in the movement of the tides. Their interior or shore limit is formed by the line reached by the highest tides and equinoctials. Where the tides are not perceptible, the seashore begins at that line on the land reached by the waters in ordinary storms or hurricanes.'

"Articles 4 and 5 are as follows:

" 'Art. 4. The lands which are added to the shores by the accessions and accretions caused by the sea belong to the public domain. Whenever the waters of the sea cease to touch them, and they are not necessary for purposes of public use, nor for the estab-
110 lishment of special industries, nor for the coast guard service, the Government shall declare them to be the property of the owners of the adjoining estates as an addition thereto.

" 'Art. 5. The lands reclaimed from the sea as the result of works constructed by the State or by the provinces, towns or individuals duly authorized, shall belong to whomever has constructed the works, unless otherwise provided in the authorization.'

"This case is directly covered by the first part of said article 4. There is therein an express declaration that land formed in the way that this land was formed is public property. Nothing could be more explicit, and the effect of this declaration is not in any way

limited by the subsequent provisions of the same article. The claim of the appellants that these subsequent provisions indicate that the ownership of such land is in the private persons who own the adjoining property, and that the declaration which is spoken of is simply proof of that ownership, can not be sustained. It is in direct conflict with the statement made in the first part of the article. The true construction of the article is that when these lands which belong to the State are not needed for the purposes mentioned therein, then the State shall grant them to the adjoining owners. No attempt was made by the appellants to prove any such grant or concession in this case and, in fact, it is apparent from the evidence that the conditions upon which the adjoining owners would be entitled to such a grant have never existed because for a long time the property was used by the Spanish navy and it is now occupied by the present Government as a naval station, and works costing more than $500,000, money of the United States, have been erected thereon.

"The view which the commission appointed to draft the law of
1866 took of this question, as indicated in the preface to
111 that law, loses its force when it appears, as pointed out by the
Solicitor-General, that their view was not adopted in the law which was finally passed. (I Alcubilla Diccionario de Administración, 4th ed., p. 344, note.)

"The provisions contained in the same law in regard to the easement of salvage and coast guard are not inconsistent with the construction which we have placed on article 4. The beach is always the same, though it may be in different places at different times. It is always the land between low and highwater mark, but it may, as it did in the case at bar, change with the accretion caused by the action of the water. The easement of salvage and coast guard must necessarily bear the same relation to the beach, whether the land adjoining the beach belongs to the State or to private persons. In the case at bar the easement of salvage after some years necessarily rested upon the public property of the State and not upon the property of adjoining owners.

"With reference to the land which was formed prior to 1871, the law governing the same is found in the *Partidas*, the provisions of that body of law being applicable under the circumstances to a case of this character.

"Law 3, title 28, partida 3, provides in part as follows:

"'Law III. The things which belong in common to all the creatures which live in this world are these: the air, and the rainwaters, and the sea, and the shore thereof.'

"Law 4 of the same title provides in part as follows:

"'. . . and all that place is known as the shore of the sea which is covered by the waters thereof, to the highest point reached by them during the entire year, whether it be during the period of the winter or of the summer.'

112 "Law 6 of the same title, however, provides that the banks of rivers—that is, the part between high and low water mark (*ribera*)—belong to the owners of the adjoining land, and law 24

of the same title provides that land gained by accretion in rivers belongs, as a general rule, to the adjoining owners. There is no such provision, however, in regard to land added to the shore by the action of the sea. In Arrazola' Enciclopedia Española, published in 1849, there is found in volume 2, at page 582, the following:

"'Nor does there exist any right of accretion with respect to the changes made by the sea which leave above water mark any piece of land adjoining the fields or the beach. The French law has thought it proper to expressly decide this point in the manner above stated; but it should be sufficient to remember that these lands are considered as appertaining to the public domain in order to so determine in all cases, even if there should be no final decision to that effect.'

"In the case of Catherine Zeller *vs.* The Southern Yacht Club (34 La. Annual, 837) the court says, at page 839:

"'The plaintiff, however, denies that Lake Pontchartrain is either the sea or an arm of the sea, and therefore contends that this question of accretions or alluvion on the seashores has no applicability to this case. It might be sufficient reply to this to say that the only acknowledged right to accretions as property, under our law, are those formed on rivers and running streams; and that there is no recognition of any property right therein when formed on lakes, bays, arms of the sea, or other large bodies of water, and that the modes or ways of the acquisition of property are limited to
113 those expressly prescribed by law and cannot be extended by implication.'

"The *Partidas* having expressly declared that the banks of rivers belong to the adjoining owners, and that what is added to the banks by accretion belongs to such owners, and having said in the same title that the shore of the sea belongs to the public, and not having made any declaration that what is added to the shore by the action of the sea belongs to the adjoining owners, we are bound to infer that it was not the intention of the makers of that body of laws that such land formed by the action of the water should belong to the proprietors of the adjoining land. The general rule is that what is added by accretion belongs to the owner of the thing to which it is added. Applying this rule to lands added to the shore of the sea by the action of the water, it would follow that such addition belongs to the public, and we hold that prior to 1871 the land formed in this case by the action of the sea did not belong to the grantors of the plaintiffs, the owners of the adjoining property, but belonged to the public.

"The plaintiffs relied also upon the fact that in 1890 their grantors were inscribed in the Registry of Property as the owners of an estate bounded on the north by the Bay of Manila, on the south by the Isthmus of Dalahican and land belonging to José Baso, on the east by the Cove of Cañacao, an estero of the pueblo of San Roque, and Cove of Bacoor, and on the west by Manila Bay. The property in question is now included in these boundaries and the larger part of it must have been included therein in 1890, when the inscription was made.

"The land here in controversy did not belong to the persons in whose name it was inscribed at the time this inscription was
114 made. On the contrary, it belonged to the State. By the terms of article 33 of the Mortgage Law, the inscription of this property in the name of the grantors of the plaintiffs did not deprive the State of its interest therein. (Merchant *vs.* Lafuente, 4 Off. Gaz., 239). Neither is the State so deprived of its interest by the provisions of article 34 of the law. The plaintiffs, when they purchased the land, knew its location with reference to the sea. They were bound to know that any land which the sea had added to the former tract there existing did not belong to the adjoining owner but belonged to the State. They were bound to know that the owners of the adjoining estate had no right to convey any land that had been added thereto by the action of the sea.

"Moreover the inscription itself gave them express notice that a part of the land had been so formed. There are in fact two descriptions in the inscription which are not consistent with each other. The first is the one above quoted. But after giving that, the registry does on to give the description of the land as it appeared from the survey of 1811, stating in detail all of the metes and bounds of that survey. Within this latter description the land in controversy would not be included. The registry then states that in 1856 another survey was made—

"'Including some lands which had been reclaimed by accretion and excluding others which had been washed away by the sea, it being noted in this second proceeding that the differences observed in various parts of the property are of small importance inasmuch as they do not change the direction of the bearings nor the boundaries.'

"The purpose of this second survey is not stated with entire correctness in the registry, for its sole object was to verify the
115 survey of 1811 for the purpose of ascertaining if certain lots of land then in controversy were within or outside the boundaries of that survey. But passing this point, it is apparent that the registry gave the plaintiffs express notice that some of the land inscribed had been formed by the action of the sea and that it was therefore public property.

"They are not then entitled to the protection of article 34 of the Mortgage Law. It did not appear from the registry that their grantors had the right to convey this land. On the contrary, it expressly appeared therefrom that they had no right to convey it if it had been formed by the action of the sea.

"Having come to the conclusion that the land in question always has been the property of the State, it is not necessary to consider the question of the statute of limitations nor the other questions raised by the various assignments of error contained in the appellants' brief.

"The judgment of the court below is affirmed, with the costs of this instance against the appellants.

"After expiration of twenty days let judgment be entered in ac-

cordance herewith and at the proper time let the record be remanded to the court below for proper action. So ordered.

"Arellano, C. J., Torres, Mapa, Johnson, Carson, and Tracey, JJ., concur.

"Judgment affirmed."

That thereafter, on the 22nd day of September, 1908, came said plaintiff and filed its assignment of errors herein, which reads in words and figures as follows, to wit:

116 "That thereafter, on the twenty-second day of September, 1908, comes said Ker and Company, plaintiff in said cause, by Kinney & Lawrence, its attorneys, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to wit:

I.

"That the judgment entered herein on the 22nd day of November, 1906, is erroneous, to wit:

"It having been admitted by the parties to the action and found as a fact by the Court that the land in question in said cause was added to the land of the plaintiff by accretion, the vital question in said cause, and the only one determined by the Court, is: Do new lands added by the action of the sea to plaintiff's estates become by accretion incorporated in such estates, or are they public domain? The Court held that they are public domain, and that the land in controversy is public domain and not part of the estate of the plaintiff, and rendered judgment for defendant.

"Wherefore said plaintiff, Ker and Company, prays that the judgment of the Supreme Court of the Philippine Islands may be reversed.

(Signed) KINNEY & LAWRENCE,
6 Escolta, Manila,

(Signed) JOHN W. SLEEPER,
18 Plaza Cervantes, Manila,
Attorneys for Plaintiff."

And then and there prayed that a writ of error might issue out of the Supreme Court of the United States for the correction
117 of the errors so complained of, which was done accordingly.

118 Supreme Court of the Philippines. Filed Dec. 4, 1908, 10:15 A. M. Clerk's Office.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 2394.

KER & COMPANY, a Mercantile Partnership, Plaintiff in Error,
versus
ALBERT R. COUDEN, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed by and between Ker & Company, plaintiff in error, and Albert R. Couden, defendant in error, represented by their respective undersigned counsel, that, inasmuch as there is no question of fact involved in the above entitled cause, the record of proceedings in the said cause to be transmitted by the Supreme Court of the Philippine Islands to the Supreme Court of the United States shall consist of the foregoing transcript of record of one hundred and seventeen pages, and that the said transcript shall be considered a complete and sufficient record of all matters necessary for a final determination by the Supreme Court of the United States of the questions of law involved in the above entitled cause.

Manila, P. I., December 3, 1908.

KINNEY & LAWRENCE,
Attorneys for Plaintiff in Error.
IGNACIO VILLAMOR,
Attorney for Defendant in Error,
Attorney-General for the Philippine Islands.

119 THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing one hundred and seventeen pages of typewritten matter constitute a true and correct transcript of so much of the record and proceedings in Case No. 2394 of said Court, entitled "Ker and Company, a mercantile partnership, plaintiff in error, *versus* Albert R. Couden, defendant in error, as, according to the attached stipulation by counsel, shall be considered a complete and sufficient record of all matters necessary for a final determination by the Supreme Court of the United States of the questions of law involved in said cause; and in obedi-

ence to the writ of error herein I hereby transmit the same to the Supreme Court of the United States of America.

Witness my hand and the seal of the Supreme Court of the Philippine Islands, this tenth day of December, 1908.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk Supreme Court of the Philippine Islands.

120 THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

December 14, 1906. Decision Book No. 4, Page 79. Docket No. 2394.

KER AND COMPANY, Plaintiffs and Appellants,
versus
A. R. COUDEN, Defendant and Appellant.

This Court having regularly acquired jurisdiction for the trial of the above entitled cause, which was submitted by both parties for decision, and after consideration by the Court upon the record, its decision and order for judgment having been filed on the twenty-second of November, 1906; it is hereby ordered that the judgment of the Court of First Instance of Cavite, appealed from, dated September fourteenth, 1904, be and the same is hereby affirmed, with the costs of this instance against the appellant. It is further ordered that defendant recover from plaintiffs the sum of forty pesos, Philippine currency, as costs.

(Signed) J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

[Seal of Court.]

I certify that the above is a true and correct copy of the original judgment on file in my office.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk, Supreme Court, P. I.

121 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Judges of the Supreme Court of the Philippine Islands, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, between Ker and Company, a commercial partnership, and

Albert R. Couden, a manifest error has happened, to the great damage of the said Ker and Company, as by its complaint appears; we, being willing that the error, if any, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington on the fourteenth day of January, 1909, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of October, in the year of our Lord one thousand nine hundred and eight and of the independence of the United States of America the one hundred and thirty-second.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

122 *Order Allowing Writ.*

Ordered, That the petition for a writ of error presented by Messrs. Kinney & Lawrence on behalf of plaintiff, in case No. 2394, entitled Ker & Company *versus* A. R. Couden, decided by this Court on the fourteenth day of December, nineteen hundred and six, be and the same is hereby allowed, upon the filing of a cost bond in the sum of five hundred dollars ($500.00), United States currency.

October 8th, 1908.

C. S. ARELLANO,
Chief Justice of the Philippine Islands.

123 Know all men by these presents:

That we, Ker & Company, as principals, and J. W. Howells W. H. Lawrence, all of Manila, Philippine Islands, as sureties, are held and firmly bound unto Albert R. Couden in the full and just sum of Five Hundred Dollars ($500.00), lawful money of the United States, to be paid to the said Albert R. Couden, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-second day of October, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Supreme Court of the Philippine Islands, in a suit depending in said court between Ker & Company, a commercial partnership, plaintiff, and Albert R. Couden, defendant, a

judgment was rendered against said Ker & Company, and the said Ker & Company having obtained a writ of error and a citation directed to the said Albert R. Couden citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the fourteenth day of January next.

Now, the condition of the above obligation is such that if the said Ker & Company shall prosecute the said writ of error to effect and answer all costs if it fail to make its plea good, then the above
124 obligation to be void, else to remain in full force and virtue.

(Signed) KER & COY.,
By J. M. UNDERWOOD.
(Signed) J. W. HOWELLS.
(Signed) W. H. LAWRENCE.

Signed, sealed and delivered in the presence of:

(Sgd.) JOSÉ SANTOS.
(Sgd.) F. GONZALES DIEZ.

UNITED STATES OF AMERICA,
Philippine Islands, City of Manila, ss:

On this 26th day of October, one thousand nine hundred and eight, before me, Florencio Gonzales Diez, a notary public in and for the said city of Manila, personally appeared J. M. Underwood and, being duly sworn according to law, deposed and said: That he is the manager of Ker & Company, and that he signed the name of said Ker & Company to the foregoing bond as principal therein, and that the same is the free and voluntary act and deed of the said Ker & Company; and appeared also before me J. W. Howells and W. H. Lawrence, the sureties named in the foregoing obligation, and, being severally duly sworn, according to law, each for himself did depose and say

That he is worth the sum mentioned in the foregoing bond, over and above his just debts and liabilities, in property within the Philippine Islands not exempt from execution.

(Signed) KER & COY.,
By J. M. UNDERWOOD.
(Signed) J. W. HOWELLS.
(Signed) W. H. LAWRENCE.

125 Subscribed and sworn to before me this 26th day of October, one thousand nine hundred and eight, and the said J. M. Underwood exhibited to me his personal cedula No. 1296893, issued at Manila, P. I., on the 18 day of January, one thousand nine hundred and eight; and the said J. W. Howells exhibited to me his personal cedula No. 1281035, issued at Manila, P. I., on the 15 day of January, one thousand nine hundred and eight; and the said W. H. Lawrence exhibited to me his personal cedula No. 1292342,

issued at Manila, P. I., on the 2 day of January, one thousand nine hundred and eight.

(Signed) FLORENCIO GONZALES DIES,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires December 31, 1908.

(20¢ Documentary Stamp.)

Approved by:
(Signed) C. S. ARELLANO,
Chief Justice of the Supreme Court.

[Seal of the Supreme Court of the Philippine Islands.]

Certified:

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk Supreme Court, P. I.

126 Supreme Court of the Philippines. Filed Oct. 27, 1908, 11:20 A. M., Clerk's Office.

THE UNITED STATES OF AMERICA, *ss:*

To Albert R. Couden, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, on the fourteenth day of January next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Philippine Islands, wherein Ker & Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the City of Manila, Philippine Islands, this 27th day of October, in the year of our Lord one thousand nine hundred and eight.

C. S. ARELLANO,
Chief Justice of the Supreme Court of the Philippine Islands.

Received copy and service accepted for defendant this 27th day of October, 1908.

GEO. R. HARVEY,
Solicitor General.

Endorsed on cover: File No. 21,517. Philippine Islands supreme court. Term No. 721. Ker & Company, plaintiffs in error, *vs.* Albert R. Couden. Filed February 16th, 1909. File No. 21,517.

9

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. [redacted]11.

KER & COMPANY, PLAINTIFF IN ERROR,

vs.

ALBERT R. COUDEN, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

E. S. PILLSBURY,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
For the Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 152.

KER & COMPANY, PLAINTIFF IN ERROR,

vs.

ALBERT R. COUDEN, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement of the Case.

This case comes before this court upon writ of error to the Supreme Court of the Philippines on a judgment in favor of the defendant, Albert R. Couden, defendant in error here.

The action was ejectment by which plaintiff, Ker & Company, plaintiff in error here, sought to recover the possession of a certain parcel of land, situated in the Province of Cavite, and described in the complaint as follows:

> "Being a portion of what is known as Sangley Point, lying and situated within

> the municipal district of San Roque, Province of Cavite, Island of Luzon, Philippine Islands, bounded on the north by Manila Bay, on the east by Manila Bay and Canacao Cove (Ensenada de Canacao), on the south by Manila Bay, Canacao Cove, and the northeasterly boundary line of the land of the Manila Shipyard (Varadero de Manila) and by the direct prolongation of said northeasterly boundary line in a straight line northwesterly to Manila Bay, and on the west by the said northeasterly boundary of the said shipyard (Varadero), and by the said prolongation thereof and by Manila Bay" (Tr., fol. 49).

The defendant on December 22, 1903, the date of the commencement of the action, was in possession of the above-described land as Commandant of the Cavite Naval Station of the United States, and in his answer set up title in the United States. The land in controversy consists of a sandy point, covered with weeds and brush, which has been formed within the last one hundred years by accretion to the lands of the riparian proprietors through the action of the sea. In 1811 none of the said parcel of land existed. In 1856 a part of it had been formed—perhaps one-fourth of the present area. Plaintiff purchased the said land, for a valuable consideration, from the Rodriguez family, whose predecessors in interest had owned the mainland, the area of which had been so increased by the action of the sea, and plaintiff claims title thereto under certain conveyances of the said property made to it in 1901 and 1902.

At the trial of the action defendant relied upon the defense, pleaded among others in its answer, that the land in question had been formed by accretion to the riparian estates through the action of the sea, and that, therefore, title thereto was in the United States as successor to the interest of the Spanish Crown therein. The other defenses, pleaded in defendant's answer, are predicated upon the theory that title to the said land was not originally in the Spanish Crown, but as the trial court held that title to the land from the commencement of the formation thereof was in the Spanish Crown because of the fact that it had been formed by accretion, the other defenses are immaterial upon this appeal.

At the trial plaintiff, in support of its action, introduced evidence of the conveyances made to it of the land in controversy in 1901 and 1902, and also introduced evidence showing the chain of title through which it traced its asserted title to the said land back to the owners of the mainland to which the land in controversy had been added by accretion. After having introduced such evidence plaintiff conceded the truth of the averment in the defendant's answer that the said land had been continually in the process of formation since 1811 by accretion through the action of the sea. By reason of this concession, a question of law was presented to the trial court, viz., whether accretion to a riparian estate, through the action of the sea, belonged, under the Spanish law in force in the

Philippines since 1811, to the Crown for the public use or to the riparian proprietor. A decision upon this question against the plaintiff would, of course, determine the case. The question was answered by the trial court adversely to the plaintiff, and the court thereupon held that title to the land was in the United States as successor to the title which the Spanish Crown had thereto, under the said Spanish law in force in the Philippines from 1811 until 1898, the date of the acquisition of the Philippines by the United States. Judgment was thereafter entered for the defendant. From this judgment plaintiff appealed to the Supreme Court of the Philippines, which affirmed the judgment. Thereafter a writ of error was issued out of this court directed to the Supreme Court of the Philippines and, return upon said writ having been made to this court, the case is here for review.

In the appellate court below, although a number of the rulings of the trial court were assigned as error, the particular error urged by appellant was the ruling of the trial court, determinative of the case, that, under the Spanish law in force in the Philippines from 1811 to 1898, title to lands formed by accretion through the action of the sea vested in the Spanish Crown in trust for the public and that, therefore, the United States, as successor to such title of the Spanish Crown to said land, was the owner thereof. The said assigned error was the only one considered by the appellate court below and whose decision is here under review.

And in this court, although a number of errors are assigned, plaintiff in error desires to urge as error, solely, the decision of the Supreme Court of the Philippines, adverse to it, and following the ruling of the trial court, upon the question of title to lands formed by accretion from the sea, under the Spanish law in force in the Philippines from 1811 to 1898. The assignment of said error is as follows:

> "*Assignment of Error.*
>
> "It having been admitted by the parties to the action and found as a fact by the court that the land in question in said cause was added to the land of the plaintiff by accretion, the vital question in said cause, and the only one determined by the court, is: Do new lands added by the action of the sea to plaintiff's estates become by accretion incorporated in such estates, or are they public domain? The court held that they are public domain, and that the land in controversy is public domain and not part of the estate of plaintiff, and rendered judgment for defendant" (Tr., fol. 116).

ARGUMENT.

At the outset of our argument against the soundness of the conclusion of the two lower courts it is proper to state that it has at all times been expressly conceded, in accordance with the actual fact, throughout this litigation, both by the parties and by the courts below, that the law in force in the Philippines, and relating to the questions involved, between 1811, the date to which plaintiff's title relates, and September, 1871, is that contained in the "Siete Partidas"; and that, from September, 1871, to 1898, the date of the acquisition by the United States of the Philippines, the law governing said subject is that contained in the "Law of Waters" of 1866. It was admitted that the alluvion began to form prior to 1811 and that all of the land in controversy was formed by accretion subsequent to that date. The courts below were of opinion that each of said laws provided that title to accretions from the sea should be in the Spanish Crown for the public use.

Our argument is, therefore, properly divided into two subdivisions: First, against the correctness of the interpretation by the courts below of those sections of the Partidas relative to the subject of accretion to lands bordering on the seashore; and, second, against the correctness of the interpretation of the said courts of those sections of the "Law of Waters" applicable to the same subject.

I.

The Supreme Court of the Philippines Erred in Holding that the Law, as Written in the Partidas, Declares that Land Above Seashore Formed by Accretion from the Sea Belongs to the Crown and Not to the Riparian Owner.

The sections of the Partidas bearing upon the subject of the ownership of land formed by accretion by the action of the sea are as follows:

> "The things which belong in common to all creatures that live in this world are these: The air, and the waters, and the rain, and the sea, and its shore."
>
> (Law 3, Title 28, Third Partida.)

> "That place is called shore as far as the water covers it when it rises its highest in all the year, whether in time of winter or of summer."
>
> (Law 4, Title 28, Third Partida.)

> "The banks of rivers, that is the part between high and low water mark, belong to the owners of the adjoining land."
>
> (Law 6, Title 28, Third Partida.)

> "All that which rivers take away from persons little by little, in such manner that the amount of the decrease cannot be ascertained, owing to the fact that such decrease was not effected by the united action of such rivers, shall accrue to the owners of the property on which it is deposited, and those

from whom the same is taken shall have no right or recourse in the premises."
(Law 24, Title 28, Third Partida.)

In holding that the said Laws 3 and 4 of Title 28 of the Third Partida should be interpreted as meaning that accretions to land, bordering on the sea, belong to the Crown, and not to the owner of such land, and that, therefore, the land in question belonged to the Spanish Crown, the Supreme Court of the Philippines adopted the following reasoning:

First. As it is a maxim of law that the accessory follows the principal, and as Law 3 of Title 28 of the Third Partida declares that the seashore belongs to the Crown as part of the public domain, therefore any addition to the seashore by accretion must also belong to the Crown, even after it has ceased to be washed by the tides; and,

Second. As the said Laws 6 and 24 of Title 28 of the Third Partida provide that both the banks of rivers and the accretions thereto shall belong to the riparian owner, and as the said Laws 3 and 4 of Title 28 of the Third Partida declare that the ownership of the seashore is in the Crown for the public use, but are silent with reference to the ownership of accretions to land bordering on the sea, therefore the inference is that it was not intended by the lawmakers that accretions of the latter kind should belong to the riparian owner.

1. *From the premise that the accessory follows the principal, the conclusion necessarily follows that, under the said Laws* 3 *and* 4 *of Title* 28 *of the Third Partida, the ownership of land, formed by accretion through the action of the sea, is in the riparian proprietor, after it has ceased to be washed by the tides.*

Both of the courts below, as we have seen, held that, as the accessory follows the principal, and as the seashore belongs to the Crown under the Partidas, therefore any addition to the seashore must also belong to the Crown. Wherefore, concluded the said courts, the title to the land in controversy was in the Crown under the Partidas.

The fallacy of such a course of reasoning is apparent, and lies in the erroneous premise, adopted by the courts below, that the term "shore," as used in the Partidas, includes in its meaning not only land actually being swept by the tides, but also land which was at one time swept by the tides, but which thereafter, and because of the recession of the high-water line, is no longer covered by the water of the sea at any time.

It must be perfectly clear, we think, that, under the said provisions of the Partidas, while land is being actually washed by the tides of the sea, it is "shore," but that as soon as, by reason of accretion, such land ceases to be washed by the tides, it is no longer "shore," belonging to the Crown, but part of the mainland, belonging to the riparian owner. And, as the alluvion continues to be

formed, and as the water, by reason thereof, continues to recede, the alluvion continues to become attached to what was once "shore," but is now mainland, and becomes accessory thereto. Therefore we submit, under the very rule invoked by the court below, that the accessory follows the principal, it is manifest that the title to such alluvion vests in the riparian owner.

(*a*) The very language used in the said laws contained in the Partidas is wholly inconsistent with the construction thereof, adopted by the courts below, that land which is once seashore continues to be such even after, by reason of accretion, the high-water line has receded therefrom.

> "The things which belong in common to all creatures that live in this world are these: The air, and the waters, and the rain, and the sea, and its shore."
>
> (Law 3, Title 28, Third Partida.)

> "That place is called shore as far as the water covers it when it rises its highest in all the year, whether in time of winter or of summer."
>
> (Law 4, Title 28, Third Partida.)

From the express language of these definitions it appears that what is "shore" on the border of the sea during a particular year is to be determined by the high-water mark during that year, and that if in the year following such particular year the high-water line has receded, then, at the end of such later year, the land between the high-water mark

of the earlier year and the high-water mark of the later year is no longer "shore," for the waters have not covered it "when it rises its highest in all the year." And being then neither air, rain, water, sea nor shore, it does not "belong in common to all creatures," for, having expressly mentioned the particular things which "belong in common to all creatures," the lawmakers have thereby impliedly said that no other things than those enumerated "belong in common to all creatures." *Expressio unius est exclusio alterius.*

U. S. vs. Arredondo, 6 Pet., 691;
Sturges vs. The Collector, 12 Wall., 19;
Arthur vs. Cumming, 91 U. S., 362.

(*b*) The "shore" at the civil law extended to that part of the land washed by the highest tides.

> "The rule of the civil law made the *shore* of the ocean extend to the line of the highest tide in winter."
>
> *City of Galveston vs. Menard,* 23 Tex., 349, 399.

> "All that place is called 'sea beach' which is covered by the waters of the sea when at its highest point during all the year."
>
> *Hall Mexican Law,* 448.

> "The shore of the sea is that part of the land covered by water in its greatest ordinary flux, the ports, bays, roadsteads, and gulfs and the rivers, although they may not be navigable, their beds, mouths and salt marshes" (*Id.,* 448, 503).
>
> Civil Code, Mexico, Art. 802.

Equally as at the common law, the shore, at civil law, was the line of high tide.

"By the common law" this court said in *United States vs. Pacheco,* 2 Wall., 587, 590:

> "The shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea or a bay is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails. * * * If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the Mexican government, the result will be equally against the position of the appellants."

(*c*) The common-law cases upon the subject of accretion furnish a complete demonstration of the unsoundness of the premise, adopted by the appellate court below, that the term "shore," as used in the Partidas, includes land which, at any time, has been swept by the tides; and also of the fallacy of the court's conclusion that accretions from the sea belong to the Crown.

The rule at common law, as under the Partidas, is that the "shore" of the sea belongs to the Crown for the use of the public. But the rule at common law is that accretions from the sea belong to the riparian owner.

Kent vs. Yarborough, 1 Dow & Clark, 178;
3 *Kent's Comm.,* 428;
2 *Black. Comm.,* 262;

New Orleans vs. United States, 10 Pet., 662;
Saulet vs. Shepherd, 4 Wall., 502;
Banks vs. Ogden, 2 Wall., 57;
County of St. Clair vs. Lovingston, 23 Wall., 46;
Jefferis vs. E. Omaha Land Co., 134 U. S., 178;
Shively vs. Bowlby, 152 U. S., 1.

In *Shively vs. Bowlby, supra,* this court, after reviewing a large number of cases, said:

> "By the *common law,* both the title and the dominion of the sea, and rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the Crown of England, are in the King. * * * And the dominion thereof, *jus publicum,* is vested in him as the representative of the nation and for the public benefit. * * *
>
> "The rule *everywhere admitted,* that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is *equally applicable to lands bounding on tide waters,* or on fresh waters." * * * (Italics ours.)

In *Banks vs. Ogden, supra,* the court stated the rule to be as follows:

> "The rule governing additions made to land, bounded by a river, lake, or *sea,* has been much discussed and variously settled by usage and by positive law. Almost *all*

> *jurists* and legislators, however, *both ancient and modern*, have agreed that the *owner of the land*, thus bounded, is entitled to these additions. By some, the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion." (Italics ours.)

That the doctrine of the common law is as thus stated seems never to have been questioned, and, as this court has held in so many cases that the rule of the common law is that the seashore belongs to the King for the public use, but that all accretions belong to the owner of the mainland, we think it unnecessary to refer to any cases, other than those last hereinabove cited, upon the subject.

Both under the common law and under the Partidas, then, the rule is that title to the seashore is vested in the Crown for the public use. But, under the common law, and notwithstanding that the seashore belongs to the Crown, it is held that all accretions which cause the high-water line to recede belong to the riparian owner. The rule applied by the courts below, that the accessory follows the principal, is a maxim of the common law, as well as of the civil law, and it is upon this very rule that the common-law doctrine, that accretions from the sea belong to the riparian owner, is based. But if the seashore, which belongs to the Crown under

the common law, continues to be such even after by reason of continued accretion it is no longer washed by the tides, then, under the maxim that the accessory follows the principal, the only logical conclusion from that premise must be that all accretions from the sea which cause the high-water line to recede belong to the Crown. But, as we have seen, the conclusion of the common-law courts is just to the contrary, and of course is based upon the obvious premise that, although the "seashore" belongs to the Crown, that "seashore" ceases to be such as soon as the tides cease to wash over it; and accretions from the sea, causing the high-water line to recede, become accessory, not to the "seashore," which has moved seaward, but to the land of the riparian proprietor.

(*d*) The provisions of the Law of Waters of 1866 and those of the Law of Ports of 1880 show the unsoundness of the said premise, adopted by the courts below.

It affirmatively appears from the provisions of the Law of Waters of 1866, which went into effect in the Philippines in 1871, that the term "shore," as used therein, includes in its meaning, solely, land actually being washed by the tides. This, we think, we will be able to demonstrate in a subsequent part hereof, in considering the subject of ownership of alluvion under the said Law of Waters.

This also affirmatively appears from the pro-

visions of the Law of Ports upon the subject of seashore.

The Law of Ports of 1880, which superseded the Law of Waters of 1866 in Spain, provides as follows:

> "ARTICLE 1. The following are of the national domain and public use, without prejudice to the rights of individuals:
>
> "1. The maritime-terrestrial zone, which is that space of the coasts or maritime frontiers of Spanish Territory which is bathed by the sea in its ebb and flow, wherever the tides are perceptible, and by the greatest waves of storms where tides are not perceptible.
>
> "ARTICLE 2. The lands added to the shores by accretions and deposits caused by the action of the sea are a part of the public domain. When, in consequence of these accretions, and because of the receding of the sea, the landward line which bounds the said shores moves toward the sea, the lands formed of what had formerly been the shore shall become the property of the State, after being properly marked out by the Departments of Treasury, Interior, and Navy, and the first-named department may dispose of them whenever they are not considered necessary for naval service or other public utility. If they are conveyed according to law, the owners of adjacent estates shall have the right of redemption."

Thus the Law of Ports, in Article 1 thereof, defines the "shore" (called therein "the maritime-terrestrial zone"), which shall be a part of the

public domain, as that space "which is bathed by the sea in its ebb and flow," which is, in substance, the same definition as is given to "shore" in Law 4 of Title 28 of the Third Partida. And Article 2 of the said Law of Ports, after providing in the first part thereof that "the lands added to the shores by accretions and deposits caused by the action of the sea are a part of the public domain," then expressly recognizes that the "shore," defined in Article 1 as being that space which is bathed by the sea, is only "shore" while it is actually being so bathed by the sea and ceases to be "shore" when the waters have receded therefrom, by providing that when, by reason of accretions and the consequent recession of the sea "the landward line which bounds the said shores moves toward the sea, the lands formed of what had *formerly* been the shore shall become the property of the State," etc.

And if the word "shore," as used in the first part of Article 2 of the Law of Ports, was intended to include that area which had once been washed by the tides, but which, by reason of accretion, had become dry land, obviously, there could have been no necessity for adding the provision that accretions from the sea, after the high-water line had receded, should also be a part of the public domain; for if the term "shore" included in its meaning dry land which had once been washed by the tides, then accretions to said land would be a part of the public domain under the first part of

said Article 2—"The lands added to the shore by accretion * * * are a part of the public domain."

As it thus affirmatively appears from the Law of Waters and from the Law of Ports that the meaning of the term "shore," as used therein, is limited to the area actually being washed by the waters of the sea, it must be held that in the Partidas, the earlier statute, the word "shore" was used in the same sense; for it is a settled rule for the construction of statutes that where it appears from a later statute *in pari materia* that a term is therein used in a particular sense, then it is to be presumed that, in the earlier statute, such term was used in the same sense.

Alexander vs. Alexandria, 5 Cranch (U. S.), 1;
U. S. vs. Freeman, 3 How., 556;
Harrison vs. Vose, 9 How., 372;
Harris vs. Runnels, 12 How., 80;
Farmers', etc., Bank vs. Dearing, 91 U. S., 29.

(2) *When Laws 3 and 4 of Title 28 of the Third Partida and Laws 6 and 24 of the same title are considered together, the only inference that can be drawn therefrom is that accretions to the "shore" of the sea do not belong to the Crown, even if it be assumed that, as held by the courts below, the term "shore," as used in the Partidas, includes land at any previous time washed by the tides.*

The Supreme Court of the Philippines having assumed that, under the Partidas, what was once "shore" continued to be such even after it had ceased to be washed by the waters of the sea, was of opinion that:

> "The Partidas having expressly declared that the banks of rivers belong to the adjoining owners, and that what is added to the banks by accretion belongs to such owners, and having said in the same title that the shore of the sea belongs to the public, and not having made any declaration that what is added to the shore by the action of the sea belongs to the adjoining owners, we are bound to infer that it was not the intention of the makers of that body of laws that such land formed by the action of the water should belong to the proprietors of the adjoining land. The general rule is that what is added by accretion belongs to the owner of the thing to which it is added" (Tr., fol. 113).

An obvious *non sequitur*, we submit, and based upon a misconception of the use of the maxim, *"expressio unius est exclusio alterius,"* as a rule of in-

terpretation; for, when the maxim is applied as a rule of interpretation to the laws as they are written, an exactly contrary conclusion to that of the said court must be reached, viz.: that, under the Partidas, accretions to the seashore do not belong to the Crown.

Of course, if appellant's position is correct, that the term "shore," as used in the Partidas, includes in its meaning only that area which is actually being washed by the tides, which ceases to be "shore" when the waters of the sea have receded therefrom, then the result reached by the court by its application of the maxim, "*expressio unius,*" etc., as appears from that portion of its opinion just quoted, is unimportant, for if the term "shore" includes only lands actually being washed by the tides, then any accretions to land bordering on the sea, and over which the tides have ceased to flow, cannot be accretions to the "shore." But, even if we assume that the term "shore" is to be given the meaning attributed to it by the courts below, then under the maxim "*expressio unius,*" etc., it follows that accretions to the "shore," as that term is understood by the said courts, do not belong to the Crown.

Laws 4 and 6 of Title 28 of the Third Partida define both the "shore" of the sea and the "banks" of rivers as being the same, *i. e.*, the space between low and high-water mark. Law 24 of the same title provides, not only that the banks (shores) of rivers, but also the accretions thereto, belong to

the riparian proprietor. Law 3 of the same title provides that *the shore of the sea belongs to the Crown, but says nothing concerning the ownership of accretions thereto.* If the law relating to the banks of rivers had provided, only, that the said banks belong to the riparian proprietor, without saying anything about the ownership of accretions thereto, nevertheless such accretions would, by necessary implication from the language of such a provision and under the rule that the accessory follows the principal, belong to the owner of that "shore." The law, with relation to the shore of the sea, provides that that shore belongs to the Crown and, if the said law stood alone and was not found in the same title with the law relating to the banks of rivers, of course, by implication from its terms, accretions to the shore of the sea would, under the provisions of the law relating thereto, belong to the owner of that shore, the Crown, under the rule that the accessory follows the principal. But the lawmakers having thus said, with reference to rivers, that the banks (shores) thereof belong to a particular (the riparian) proprietor, and then having added what was already implied, that the accretions thereto belong to the owner of that "shore," and then having said in the same title, in the law relating to the seashore, that the said shore belongs to a particular proprietor (the Crown), but omitting from said law any provision that accretions to that shore also belong to the owner of the shore itself, there-

fore, under the maxim "*expressio unius,*" etc., the only logical inference that can be drawn is that the lawmakers, by Law 3 of Title 28 of the Third Partida relating to seashore, intended that accretions to the seashore should not belong to the owner of that shore, *i. e.*, the Crown. If the lawmakers had intended that the owner of the shore of the sea should profit by accretion, why should they have so expressly provided that the owner of the "shore" of a river should so profit, and have *omitted* to say that the owner of the shore of the sea should also so profit, when, without anything being said as to the ownership of accretions, both of such owners would have been entitled to the accretions to their respective "shores"?

The case of *Hare vs. Horton,* decided by the court of King's Bench and reported in 5 Barn. and Ad., at page 160, demonstrates the soundness of the foregoing contention. There a mortgage was given upon a dwelling-house and foundry, together with all fixtures in the dwelling-house. It was held that, as under the common law a mortgage of a building also passed the fixtures contained therein, without express mention thereof, therefore, if nothing had been said in the mortgage concerning fixtures in the dwelling-house, the fixtures, both in the dwelling-house and in the foundry, would have passed by the mortgage; but that, as the superfluous expression "fixtures" was used with reference to the dwelling-house, and as the said superfluous expression was omitted

with reference to the foundry, the intention must have been that the fixtures in the foundry were not to pass by the mortgage. Taunton, J., said:

> "On the first point, I confess I have not been able to entertain much doubt. It is very plain, that if the granting part of the deed had only mentioned the foundery, messuages, and dwelling-houses, the foundery fixtures, as well as those in the dwelling-house would have passed. There are many cases which show this. But the deed goes on to say: 'together with all grates, boilers, bells and other fixtures in and about the said dwelling-house.' I think the mention of these fixtures excludes those in the foundery, on the principle, *'expressio unius est exclusio alterius.'* Why, it may be asked, were these particular ones mentioned if the whole were intended to pass?"

It is respectfully submitted, therefore, that the appellate court below wholly misconceived the purpose and effect of the maxim, *"expressio unius,"* etc., as a rule of interpretation, when applied to the said laws of the Partidas, and that, by a proper application of the said maxim to the said laws, the only conclusion that can be reached is that accretions to the seashore were not intended by the law makers to belong to the Crown; and this, even if we assume (contrary to the obvious meaning thereof) that the term "shore," as used in the Partidas, and as held by the courts below, includes land at one time washed by the tides, but from which the waters of the sea have receded.

(3) *Under the rule that statutes, if doubtful, must receive a reasonable construction, it follows that, under the Partidas, the title to land formed by accretion on the borders of the sea is not in the Crown, but is in the riparian proprietor.*

It is one of the primary canons of construction that a statute should receive a reasonable interpretation, if the meaning thereof is doubtful.

Stephens vs. Cherokee Nation, 174 U. S., 445;

Beley vs. Naphtaly, 169 U. S., 353.

> "And that certainly is not a reasonable interpretation for which no reason can be assigned."
>
> Per Justice Matthews in *Chesapeake, etc., R. Co. vs. Miller*, 114 U. S., 176, 187.

We think that we have hereinabove shown that the provisions of the Partidas, dealing with the subject of seashore, are not ambiguous and that their obvious meaning is that land, while it is actually being covered and uncovered by the tides, belongs to the Crown, but that when such land ceases, by reason of accretion, to be swept by the tides, it thereupon ceases to be seashore and no longer belongs to the Crown; and that, therefore, riparian lands profit by accretions from the sea. But if it be assumed that the meaning of the said provisions of the Partidas is doubtful (and it will not, we suppose, be contended that the Partidas,

clearly, and in unambiguous language, provide that accretions from the sea belong to the Crown), then, according to the foregoing canons of construction that statutes must receive a reasonable interpretation and that "that certainly is not a reasonable interpretation for which no sufficient reason can be assigned," it must be held that the "shore," contemplated by the Partidas, is that land, only, bordering on the sea, which is actually being swept by the tides; that such land, only, belongs to the Crown for the use of the public; and that, under said law, accretions from the sea belong to the riparian owner.

If it be true, as held by the appellate court below, that, under the Partidas, what was once seashore, *i. e.*, land once swept by the tides, continues to be seashore when, by reason of continued accretion, it has ceased to be washed by the sea and has become dry land, and that, therefore, all accretions to land which was once shore belong to the Crown, it is at least clear that such a construction has not the merit of being reasonable. And not only "no sufficient" nor any "reason can be assigned" for such a construction of the said laws, but, on the other hand, reasons for a construction in favor of the riparian proprietor are perfectly apparent.

If the sea should wash away the land of a riparian proprietor, it cannot be open to doubt that the Crown would profit thereby under the Partidas, for all of the land covered by the incoming waters would belong to the Crown, as, by express defini-

tion, that land is "shore" which is covered by the water "when it rises its highest in all the year, whether in time of winter or of summer" (Law 4, Title 28, Third Partida), and the "shore" belongs to the Crown (Law 3, *id.*). And, although this is so, nevertheless, under the ruling of the appellate court below, if the riparian proprietor should lose a part of his land by the encroachment of the sea, he would have no right, under the Partidas, to regain by accretion what he had thus lost. Surely an interpretation of the Partidas which would lead to such an unreasonable and inequitable result will not be adopted if any other interpretation is possible.

That all reason is against the said interpretation put upon the Partidas by the court below will sufficiently appear, we think, from a quotation of the language used in some of the cases decided by this court and dealing with the subject of the ownership of accretion.

In *New Orleans vs. United States*, 10 Peters, 662, 717, this court said:

> "The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations shall still hold by the same boundary, including the accumulated soil. No other rule can be applied, *on just principles*. Every proprietor whose land is thus bounded, is subject to loss, by the same means which may add to his territory; and *as he is with-*

> *out remedy for his loss, in this way, he cannot be held accountable for his gain.*" (Italics ours.)

In *Jefferis vs. E. Omaha Land Company*, 134 U. S., 178, 192, the court quotes with approval from 2 *Black Comm.*, page 262, as follows:

> "And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma;* or by *dereliction*, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimus non curat lex;* and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss."

And in *Banks vs. Ogden*, 2 Wall., 57, 67, it is said:

> "The rule governing additions made to land, bounded by river, lake or sea, has been much discussed and variously settled by usage and by positive law. *Almost all jurists and legislators, however, both ancient and modern*, have agreed that the owner of the land, thus bounded, is entitled to these additions. By some, *the rule has been vindicated on the principle of natural justice*, that he who sustains the burden of losses and of repairs imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion." (Italics ours.)

That the construction placed upon the laws of the Partidas by the appellate court below is unjust and unreasonable again appears from still another consideration, which is that, under such a construction, the riparian owner would be subjected to the deprivation of his right of access to the adjoining water, which constitutes, in many instances, the principal value of his land.

The Supreme Court of Minnesota in *Lamprey vs. Metcalf*, 52 Minn., 181, has the following to say upon this subject:

> "But it seems to us that the rule rests upon a much broader principle, and has a much more important purpose in view, viz., to preserve the fundamental riparian right—on which all others depend, and which often constitutes the principal value of the land—of access to the water. The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line has been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts."

It is manifest that no reason whatsoever can be assigned for the interpretation placed upon the sections of the Partidas, dealing with the ownership of the seashore, by the Supreme Court of the Philippines and, as "that certainly is not a reasonable interpretation for which no sufficient reason can be assigned" (*Chesapeake, etc., R. Co. vs. Miller, supra*), it is respectfully submitted that, if

there is any ambiguity to be found in the said sections of the Partidas, the interpretation of the appellate court below must be rejected.

(4) *The rule that, where a statute of one State is adopted by another, it is to be presumed that the interpretations placed upon the original statute is also adopted, makes it clear that, under the Partidas, accretions from the sea do not belong to the Crown, but belong to the riparian owner.*

The laws of Spain, as embodied in the Partidas, were drawn largely from the Institutes of Justinian.

> Hannis Taylor's "*Science of Jurisprudence,*" p. 162.

And the laws of the Partidas dealing with the subjects of seashore and river banks are taken from, and are practically identical with, the provisions relating to the same subjects found in the Institutes of Justinian. Following are the provisions of the Partidas and those of the Justinian Code relating to the said subjects-matter:

Partida.

> "1. The things which belong in common to all creatures that live in this world are these: The air, and the waters, and the rain, and the sea and its shore" (Law 3, Title 28, Third Partida).

Justinian Code.

"1. By the law of nature, these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea" (Inst. Lib. II, Tit. I, 1).

Partida.

"2. That place is called shore as far as the water covers it when it rises its highest in all the year, whether in time of winter or of summer" (Law 4, Title 28, Third Partida).

Justinian Code.

"2. The seashore extends as far as the greatest winter flood runs up" (Inst. Lib. II, Tit. I, 3).

Partida.

"3. The banks of rivers, that is the part between high and low-water mark, belong to the owners of the adjoining land" (Law 6, Title 28, Third Partida).

Justinian Code.

"3. But the banks of a river are the property of those whose land they adjoin" (Inst. Lib. II, Tit. I, 4).

Partida.

"4. All that which rivers take away from persons little by little, in such manner that the amount of the decrease cannot be ascer-

tained, owing to the fact that such decrease was not effected by the united action of such rivers, shall accrue to the owners of the property on which it is deposited, and those from whom the same is taken shall have no right or recourse in the premises" (Law 24, Title 28, Third Partida).

Justinian Code.

"4. Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase; and that is added by alluvion which is added so gradually that no one person can perceive how much is added at any one moment of time" (Inst. Lib. II, Tit. I, 20).

As it thus appears that the laws of the Partidas relating to the subjects of river banks and seashore were taken directly from, and are identical with, the provisions of the Institutes of Justinian upon the same subjects, it follows that the interpretation placed upon said provisions of the Roman law must be presumed to have been also adopted by the Spanish law makers. And that the interpretation placed upon the provisions of the Roman law by the writers upon that subject ought to be followed in construing a statute of a country which has adopted such statute from the civil law has been recognized by this court.

Viterbo vs. Friedlander, 120 U. S., 707;
Groves vs. Sentell, 153 U. S., 465;
Meyer vs. Richards, 163 U. S., 385.

The Roman law writers all agree that under the provisions of the Justinian Code, hereinabove quoted, accretions from the sea belong to the riparian owner.

> "After occupancy, the civil law considers accession, which was natural, artificial or mixt. Natural accessions were * * * Secondly, by alluvion or secret insensible addition of earth, washed up by the *sea* or river."
>
> *Browne on Roman Law*, 2d ed. of 1802, at p. 239.

> "Second. In this case it was *per incrementum temporis*, and *per mare projecta*. It is not a sudden reliction or *recessus maris*, as I shall have occasion to mention hereafter. And though there is no *alluvio* without some kind of reliction for the sea shuts out itself, yet the denomination is taken from that which predominates. It is an acquest *per projectionem or alluvionem*, not *per recessum* or *relictionem*.
>
> "Third. That such an acquisition lies in custom and prescription; and that it hath a reasonable intendment because these secret and gradual increases of the land adjoining *cedunt solo tanquam majus principali;* and so by custom it becomes as a perquisite to the land, as it doth in all cases of this nature by the *civil law*."
>
> *Hale, de Jure Maris.*

> "Lands gained from the *sea* or river, either by alluvion from the washing up of sand and earth, or water gradually and imperceptibly receding, accrue by natural ac-

cession to the owner of the estate which receives the addition."

Lord Mackenzie's Roman Law, p. 177.

"Alluvion is called an increase *per projectionem* which, if slow and secret, and is so gradually and insensibly occasioned as to render impossible to perceive how much is added in each moment of time, it then belongs to the riparian proprietor to whose land the accession is made, and none but riparian proprietors have a claim to it. Its gradual and imperceptible formation renders it no more a part and parcel of the bottom of the *sea* or river (*fundus maris*) which was before the property of the sovereign. Such is the doctrine of the *Roman,* French, *Spanish,* and Louisiana jurisprudence."

Angell on Tide Waters, 2d ed., p. 249.

That the doctrine of the Roman law is the same as that of the common law of England, that accretions from the sea belong to the riparian proprietor, also appears from the following observations made by this court in *County of St. Clair vs. Lovingston,* 23 Wall., 46, 67:

"Blackstone thus lays down the rule of the common law: And as to lands gained from the sea, either by alluvion, by the washing up of land and earth, so as in time to make terra firma, or by dereliction as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by

> small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex;* and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss. But if the alluvion be sudden or considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry.
>
> "Blackstone takes his definition from Bracton, lib. 2, chap. 2. Bracton was a judge in the reign of Henry III, and the greatest authority of his time. Hale, in his *De Jure Maris,* says Bracton followed the *civil law.*"

As, therefore, the Roman law, upon the subjects of seashore and river banks, and as embodied in the Institutes of Justinian, has been interpretetd to mean that accretions from the sea belong to the riparian proprietor, and as the sections of the Partidas, relating to the same subjects, are identical with the provisions of the Justinian Code, from which they were taken, it is submitted that it must be held that, under the Partidas, accretions from the sea belong to the riparian proprietor.

5. *None of the authorities cited by the lower courts in support of their said conclusion lends any support thereto.*

(*a*) The first authority cited by the Court of First Instance is from Gutierrez' Studies of the

Spanish Civil Law, Title 2, pp. 92, 93, where, in commenting upon Article 2 of the Law of Ports of 1880, he says:

> "Upon the principle that the accessory follows the principal, it is declared with rigorous logic in the provision in question that accessions to a beach become public property."

What support the language quoted lends to the ruling of the said court is not very apparent. Of course, it is "with rigorous logic" that, in the Law of Ports, it is declared that "accessions to a beach become public property" when the beach itself is public property; but, as we have seen, the beach (shore), which is public property, is defined in the Law of Ports to be the land actually being swept by the waters of the sea.

The next authorities, cited by the Court of First Instance, are certain judgments of the Supreme Tribunal of Spain, dated April 30 and May 10, 1863. "According to these judgments," says the Court of First Instance, "the government may give in lease or emphyteusis all lands comprised in the beach or shore of the sea, and may grant concessions of lands gained from the sea, making for the purpose special rules which grant and create rights of exclusive possession and use" (Tr., fol. 78).

These authorities, like the one first cited, simply recognize the obvious proposition that, as the title to the beach or shore of the sea is in the govern-

ment, for the public use, the government may lease such beach or shore and the lands added thereto, *i. e.,* the lands over which the tide flows. The said authorities do not even purport to hold that lands once covered by the tides continue to be shore or beach after such lands have ceased to be washed by the tides.

The authority next considered by the Court of First Instance, as supporting its conclusion, is the case of *Zeller vs. Southern Yacht Club,* 34 La. Ann., 837. But the case cited is entirely irrelevant to any question here involved, for the Code of Louisiana, upon a provision of which the decision was expressly based, after providing that title to accretions from rivers is in the riparian owner, then states that this right does not exist in the case of accretions from the sea. It was by reason of this specific provision of the Code that the Louisiana court came to the conclusion that estates bordering on the shores of lakes, bays, and other arms of the sea, did not profit by accretion. No such provision is to be found in the Partidas.

(*b*) In the opinion rendered by the Supreme Court of the Philippines, the only authorities cited are *Zeller vs. Southern Yacht Club, supra,* and the following from Arrazola's *"Enciclopedia Espanola,"* published in 1849, Vol. 2, p. 582:

> "Nor does there exist any right of accretion with respect to the changes made by the sea which leave above water mark any piece of land adjoining the fields or the beach. The French law has thought it proper to ex-

> pressly decide this point in the manner above stated, but it should be sufficient to remember that these lands are considered as appertaining to the public domain in order to so determine in all cases, even if there should be no final decision to that effect."

It is obvious, from the language quoted, that what Arrazola was referring to was not land formed by accretion, but land left below ordinary high-water mark by the sudden recession of the sea. And in such case, neither under the common law nor under the civil law did the riparian owner gain title to the land thus left dry.

None of the authorities cited by the courts below, therefore, lends support to their conclusion that, under the Partidas, riparian estates did not profit by accretions from the sea.

6. On the other hand, the authorities support the contention of the appellant that, under the Partidas, accretions formed by the action of the sea, when they become dry land, by reason of the recession of the high-water mark, belong to the riparian owner.

> "Do lands bounded by the sea enjoy the right of alluvion? * * * Under our ancient law it appears that the doubt must be resolved in favor of those owners whose lands were bounded by the sea."
>
> Amandi, *Civil Code,* Vol. 2, p. 95.

The Spanish commentator, Scaevola, in his *Commentary on the Civil Code,* Vol. 6, page 338, de-

clares that the Law of Ports of 1880 established a *new doctrine* in making lands formed by the sea and left above high-tide line a part of the public domain.

Escriche, at p. 449 of the *Dictionary of Law*, says:

> "Alluvion added by the sea to shore lands belongs by right of acquisition to the proprietors of the adjacent hereditaments."

It is respectfully submitted that, under the Partidas, that part of the land in controversy which had been formed after the year 1811 until September, 1871, the date upon which the Partidas were superseded by the Law of Waters (in so far as the former related to the subject of seashore), belonged to the riparian proprietors, and, that, therefore, the appellant, as successor in interest of such proprietors, is the owner of such land, and entitled to the possession thereof.

II.

UNDER THE LAW OF WATERS OF 1866, WHICH WENT INTO EFFECT IN THE PHILIPPINES IN SEPTEMBER, 1871, TITLE TO LANDS FORMED BY ACCRETION VESTED IN THE RIPARIAN PROPRIETOR, AND NOT IN THE CROWN.

We think it entirely clear, as we will hereinafter endeavor to show, that, under the provisions of the Law of Waters which went into effect in the Phil-

ippines in September, 1871, title to accretions formed by the action of the sea and which had become dry land was vested in the riparian proprietor.

1. But, even assuming that the provisions of the Law of Waters purport to vest title to such accretions in the Crown, nevertheless the Law of Waters could not operate to deprive a riparian proprietor of his right to future alluvion which, as we have shown, he had under the Partidas; for, under the civil law, as well as under the common law, the right to future alluvion is considered a vested right which, once existing, cannot be taken away by any act of the lawmaking body.

This is the doctrine in Louisiana where the civil law prevails. In the case of *Municipality No. 2 vs. Orleans Cotton Press,* 18 La., 122, lands held in private ownership and bordering on a river were increasing by accretion from year to year and, under existing laws, such increase belonged to the riparian estate. The legislature enacted a statute which, the plaintiff claimed, vested the title to future alluvion in the city. The court, however, held that, even assuming that the said statute attempted to vest the right to future alluvion in the city, the legislature was without power to accomplish that result. The court said:

> "If the act of 1805 which incorporated and defined the limits of the City of New Orleans, embracing a large extent of territory from Lake Pontchartrain to the river

and numerous plantations fronting on the Mississippi, and all previously entitled, according to the existing laws, to any alluvion which might be formed upon their front, had declared in explicit terms, that after the passage of that act, the owners of such tracts of land fronting on the river should no longer be entitled to any alluvion which might be formed, but that the same should thereafter accrue to the benefit of the city, *there is not perhaps a single mind capable of discriminating between the legitimate exercise of legislative authority and acts of sheer spoliation, that would not pronounce such an enactment to be without any constitutional validity. Will it be said that the right to future alluvial formations is not a vested right? I answer that such right is inherent in the property itself and forms an essential attribute of it, resulting from natural law in consequence of the local situation of the land, just as much as the natural fruits of a tree belong to the owner of the land; and that such an attempt to transfer from the owner of the land to the city, the future increase by alluvion, would be as legally absurd, as if the legislature had declared, that after the incorporation of the city, the fruits of all the orange trees within its limits should belong thereafter to the city, and not to the owners of the orchards and gardens.*" (Italics ours.)

In *County of St. Clair vs. Lovingston*, 23 Wall., 46, both the Congress of the United States and the legislature of the State of Illinois passed laws purporting to vest title to certain lands, bordering on

the Mississippi River, in the County of St. Clair. The said county, proceeding under such statutes, brought ejectment against the defendant Lovingston, who defended upon the grounds, among others, that the land bordering on the river had been granted by the United States to one of his predecessors in interest; that one of the boundaries named in the grant was the Mississippi River; and that, therefore, he had title to the alluvion formed at the time of the action, and a vested right to future alluvion. The court upheld the defendant's contention, saying:

> "*The riparian right to future alluvion is a vested right.' It is an inherent and essential attribute of the original property.* The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim, '*qui sentit onus debet sentire commodum*' lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his." (Italics ours.)

The case of *County of St. Clair vs. Lovingston, supra*, was cited with approval by this court in

Nebraska vs. Iowa, 143 U. S., 369, and
Shively vs. Bowlby, 152 U. S., 1,

and has been followed by the State courts in

Freeland vs. Penn. R. Co., 197 Pa., 529, and
Knudson vs. Omanson, 10 Utah, 124.

And not only, we submit, has the riparian proprietor a vested right to the ownership of future alluvion, but he also has a vested right of access to the shore, of which he would be deprived by the taking away of his right to future alluvion.

It is respectfully submitted, therefore, that even assuming that the Law of Waters, which superceded the Partidas as the law of the Philippines, upon the subject of seashore, in 1871, by its terms took away the right of the riparian proprietors to future alluvion, vested in such proprietors under the Partidas, the said law was wholly inoperative.

2. The Law of Waters of 1866, in so far as it has any bearing upon the question in controversy, provides as follows:

> "ART. 1. The following are a part of the national domain and for public use * * * (3) The shores (playas). By shore is understood that space alternately covered and uncovered by the waters in the movement of the tide. Its interior or terrestrial limit is the line reached by the highest equinoctial tides. Where the tides are not perceptible, the shore begins on the land side at the line reached by the sea during ordinary storms and tempests.
>
> "ART. 4. The lands added to the shores by accretion and deposits, caused by the action of the sea, are part of the public domain. When they are no longer washed by the waters of the sea and are not necessary for purposes of public utility, nor for the establishment of special industries, nor for the coast-guard service, the government

shall declare them the property of the owners of the estates adjacent thereto, as increase of such estates.

"ART. 8. The estates adjacent to the sea or to its shores are subject to easements in favor of salvage and coast police.

"ART. 9. The easement of salvage comprises a zone of 20 meters, measured landward from the interior limit of the shore, and public use shall be made thereof in cases of wrecks for the salvage and deposit of the remains, effects, and cargoes of ships wrecked. Furthermore, fishing boats may ground in said zone, when they are compelled to do so by stress of weather, and may temporarily deposit their effects on the land, but without injuring the estates. This terrestrial or salvage coast zone shall advance as the sea recedes, and shall recede as the sea advances, for it shall always lie adjacent to the shore.

"ART. 10. The easement of coast police shall consist in the obligation to leave clear a road, not to exceed six meters in breadth and marked off by the public administration. This road shall lie within the terrestrial coast zone referred to in the preceding article. * * *"

It is clear, we submit, that, under the foregoing provisions of the Law of Waters, the "shore" itself is increased by alluvion deposited below the high-tide line, while the riparian estate is increased by the alluvion when the high-tide line has receded therefrom.

The courts below held that land formed in the manner in which the land in controversy was

formed was a part of the public domain, the said courts being of opinion that accretions from the sea, and from which the high-tide line has receded, are, under Article 4 of the Law of Waters, "lands added to the shore by accretion" and, therefore, "part of the public domain."

The unsoundness of the conclusion lies in the fact that the courts below adopted, as a basis for their conclusion, the same erroneous premise which was adopted by them in holding that, under the Partidas, accretions from the sea belong to the public, viz., that the term "shore," as used in these Spanish laws, includes land at one time washed by the tides, but which has become dry land because of the recession of the sea, on account of the accretions therefrom.

We have already shown, we think, the error in this premise in discussing the provisions of the Partidas, relating to the ownership of the seashore. But in addition to the reasons advanced in that discussion, a further conclusive reason against the soundness of that premise, as applied to the Law of Waters, appears in the very provisions of that law.

(*a*) *The various provisions of the Law of Waters affirmatively show that the term "shore," as used in that law, includes land being swept by the tides, only, and that when, by reason of accretions, the high-tide line recedes from such land it thereupon ceases to be "shore."*

(1) Article 1 provides that "by shore is understood that space alternately covered and uncovered by the waters in the movement of the tide."

As, therefore, "shore" is that space "alternately covered and uncovered by the waters," it is perfectly clear that "shore" cannot also be space which is *not* "alternately covered and uncovered by the waters." *Expressio unius est exclusio alterius.* Wherefore, by express definition, "shore" ceases to be such upon its ceasing to be swept by the tides.

(2) Article 4 of the Law of Waters, after providing in the first part thereof that "lands added to the shores by accretion and deposits, caused by the action of the sea, are part of the public domain," then goes on to say, in the latter part thereof, that "when they (lands added to the shore by accretion) are no longer washed by the waters of the sea * * * the government shall declare them the property of the owners of the estates adjacent thereto, as *increase of such estates.*"

If it be true, as held by the courts below, that what is once "shore" continues to be "shore" even after, by reason of accretions, it is no longer

washed by the tides, then, and necessarily, accretions from the sea could never be considered "as increase of such (riparian) estates," but such alluvion would always be increase of the "shore," as thus defined by the courts. But the latter part of said Article 4 expressly states that, when the land, formed by accretions from the sea, is no longer washed by the waters, it is then to be considered "as increase of such (riparian) estates." Wherefore, it is manifest from the second provision of Article 4 of the Law of Waters that the word "shore," as used in the said law, includes, only, land actually being washed by the tides, and does not include land which was, at one time, washed by the tides, but which has become dry land by the recession of the sea, caused by accretions therefrom.

(3) The question was suggested by the Court of First Instance that if, under the first part of said Article 4, accretion, which, by recession of the sea has become dry land, does not become part of the public domain, "what is the accretion which the law declares to be public domain"?

The answer to this question readily suggests itself. The accretion, which Article 4 declares to be public property, is the accretion from the sea which increases the area of the tide lands—the "shore"—in the sense of that word as appellant understands it; for it must be perfectly clear that, by reason of accretion, the area of tide lands may

be increased without the line of high tide either advancing or receding. And that this answer to the said question suggested by the said court is an entirely logical and conclusive one is well shown by a reference to the common law upon the subject.

> "In England * * * what is gained to the *land* by gradual and imperceptible addition, goes to the neighboring proprietor, while that which is gained to the *shore* by similar imperceptible change, is added to the right of the Crown."
>
> *Bell's Law of Scotland,* 10th ed., sec. 642.

(4) The provisions of Articles 8 and 9 of the Law of Waters prove the error in the conclusion of the courts below that the "shore," mentioned in Article 4 of the Law of Waters, includes land from which, by reason of accretions, the high-water line has receded.

Article 8 of the Law of Waters provides that "lands adjacent to the sea or to its shores are subject to easements of salvage and coast guard."

Article 9 of the said law provides that "the easement of salvage comprises a zone of twenty meters measured landward from the interior limit of the shore. * * * This terrestrial or salvage coast zone shall advance as the sea recedes and shall recede as the sea advances, because it must always lie adjacent to the shore."

If this salvage zone "shall *advance as the sea recedes,* and shall *recede as the sea advances,*" be-

cause, as declared by the lawmakers, that zone "must always be *adjacent to the shore,*" it is certain that the term "shore," as employed in the Law of Waters, is that area actually being washed by the tides, which changes with the shifting of the high-tide line.

It is, therefore, manifest that the premise, upon which was based the conclusion of the courts below, is unsound, and that the term "shore," as used in the Law of Waters, is that area, only, which is actually being covered and uncovered by the tides. Wherefore, it follows, lands added to the "shore" by accretion, which belong to the public under Article 4, are, solely, *lands which increase the area below high-water mark.*

(*b*) *Under the express provisions of the Law of Waters, accretions from the sea, when they are no longer covered by the tides, belong to the riparian owner, and are not a part of the public domain.*

Articles 8 and 9 of the Law of Waters, just considered, provide that the salvage zone "shall advance as the sea recedes, and shall recede as the sea advances, for it shall always lie adjacent to the shore."

If the salvage zone lies in the estates adjacent to the shore, as provided in Article 8, and such zone advances as the sea recedes, as provided in article 9, then, and necessarily, the adjacent estates must *also* advance as the sea recedes. There can be no escape from this conclusion.

If, as held by the courts below, under Article 4, the "lands added to the shore by accretion," and which belong to the public, include lands from which the high-tide line has receded, then, obviously, there could be no necessity for so carefully providing, in Article 9, that the public should have an easement of salvage on lands uncovered by the recession of the sea; for, under the provisions of Article 4, as construed by the courts below, such land would be part of the public domain, and it would have been entirely idle for the lawmakers to expressly provide that public domain, upon which the public necessarily has *every kind* of easement, should be subject to the *particular* easement of salvage. The necessary and only logical conclusion from the presence of this provision for the public easement of salvage on land, uncovered by the recession of the sea, must be, therefore, that, by Article 4, the lawmakers did not intend to, and did not, provide that accretions from the sea which, by reason of the recession of the high-tide line had become dry land, should be a part of the public domain.

It is respectfully submitted, therefore, that Articles 8 and 9 of the Law of Waters constitute, in effect, a declaration by the lawmakers that, while under Article 4 lands added to the "shore" are part of the public domain as long as those lands are covered and uncovered by the tides, such lands, when they cease to be covered and uncovered by the waters of the sea, thereupon cease to be a part

of the public domain, and become the property of the riparian proprietors.

(c) *The provisions of the Law of Ports of* 1880 *make it clear that Article* 4 *of the Law of Waters of* 1866 *does not have the effect of vesting title to accretions, which have become dry land, in the Government.*

The first sentence of Article 4 of the Law of Waters is identical with the first sentence of Article 2 of the Law of Ports, which superseded the former law in Spain, and is as follows:

> "Lands added to the shores by accretions and deposits caused by the action of the sea are a part of the public domain."

But Article 2 of the Law of Ports then goes on to say:

> "When, in consequence of these accretions, and because of the receding of the sea, the landward line which bounds the said shore moves toward the sea, *the land formed of what had formerly been the shore* shall become the property of the State," etc. (Italics ours.)

The addition of the provision, just quoted, to the first sentence of Article 2 of the Law of Ports, of course, demonstrates that, in framing that law, the lawmakers did not consider that the provision thereof, that "lands added to the shores by accretions and deposits, caused by the action of the sea,

are a part of the public domain," had the effect of vesting title to accretions, which had ceased to be washed by the waters of the sea, in the Crown. Else why did the lawmakers see fit to so particularly provide, in the Law of Ports, that accretions which had become dry land should belong to the State?

As, therefore, the Law of Ports, the subsequent act upon the same subject, "affords complete demonstration" of the fact that the language used in the first sentence of Article 2 thereof was understood by the lawmakers to mean that land added to the shore by accretions from the sea is a part of the public domain *only* while such land is actually being washed by the tides, and as the first sentence of said Article 2 is identical with the first sentence of Article 4 of the Law of Waters, the earlier act, it must be held that the language employed in the said article of the Law of Waters was used in the same sense.

> "If, in a subsequent clause of the same act, provisions are introduced which show the sense in which the legislators employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."
>
> Per Chief Justice Marshall in *Alexander vs. Alexandria,* 5 Cranch, 1.

d. The second sentence of Article 4 of the Law of Waters constitutes a clear recognition of the fact that it was not intended that, under the said law, accretions which had become dry land by reason of the recession of the sea should belong to the Government.

In the courts below, appellant contended that the second sentence of Article 4 of the Law of Waters clearly shows that, under the said law, accretions from which the waters of the sea have receded belong to the riparian owner. The Supreme Court below, however, refused to adopt this contention as sound, because that court said, such a contention "is in direct conflict with the statement made in the first part of" Article 4, which said statement, that court held, as we have already seen, constitutes a declaration that accretions, which have become dry land by reason of the recession of the sea, as well as accretions which are being washed by the waters of the sea, are a part of the public domain.

We have fully shown, we think, that the effect of the first sentence of said Article 4 cannot be construed to be a declaration that accretions, which have become dry land are a part of the public domain. And this being so, and the basis of the said court's conclusion thus failing, the conclusion itself must also fail.

And, we submit, the latter part of Article 4 of the Law of Waters can only mean, by the express language thereof, that if the Government does not see fit to take the possession of and the title to land

formed by accretion, and over which the tides have ceased to sweep, from the riparian owner, by virtue of its inherent sovereign power of eminent domain, and for the public purposes enumerated in the said provision, then it shall confirm the title, already vested in the riparian proprietor, *"as increase"* of his estate; and the reason for the enactment of this latter provision of Article 4 of the Law of Waters, as thus construed, is perfectly apparent. The source of title to all real property is the Government, and, as to all lands which are part of the mainland, the riparian proprietor can, ordinarily, trace his title of record back to the Government as the source thereof. But, as to new land formed by accretions from the sea, the riparian proprietor cannot, in the nature of things, trace back his title of record to the said source of all private title, the Government, without some affirmative act on the part of the latter. Therefore, in order to make certain of record the title of the riparian owner to land formed by accretion, which the Government intended should be a part of the estate of the riparian owner, the Spanish lawmakers provided, in the said second sentence of Article 4 of the Law of Waters, for *confirmation* by the Government of the title of the riparian owner to such land—"the Government shall declare them the property of the owners of the estates adjacent thereto, as *increase* of such estates." And any failure of the riparian proprietor to have his title confirmed by the Government could not, of course, affect the validity of

his actual title; for, to use the language of this court in *Carino vs. Insular Government,* 212 U. S., 449, 463, the effect of the declaration by the Government "was not to confer title, but simply to establish it."

(*e*) *If the lawmakers had intended that, under the Law of Waters, accretions from the sea should be a part of the public domain, even after they had become dry land, "it would have been easy to say so, and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision."*

National Bank vs. Matthews, 98 U. S., 621, 627.

It is submitted that the Law of Waters in plain and unambiguous language provides that alluvion, after it has become dry land by reason of the recession of the sea, becomes accessory to, and part of, the riparian estate. But if this be not so, it is *at least* entirely clear that the provisions of the said law do not, by plain and unambiguous language, declare that alluvion, when it is no longer washed by the tides, is part of the public domain. It is manifest that, if the conclusion that such alluvion is part of the public domain can be drawn at all from the provisions of the said law, it can only be done by first assuming that the provisions of the said law are ambiguous and then resolving the ambiguity against the private owner. But if

it be assumed that the provisions of the said law are ambiguous, then the ambiguity must, of course, be resolved against the government and in favor of the riparian owner for the same reasons to which we have heretofore adverted in support of our contention that, if the provisions of the Partidas are to be considered ambiguous, the ambiguity therein must be resolved in favor of the private owner.

> "Certainly, in a case like this, if there is any doubt or ambiguity in the Spanish law, we ought to give the applicant the benefit of the doubt."
>
> *Carino vs. Insular Government*, 212 U. S., 449, 460.

From the foregoing considerations, we submit that it is clear that, under the provisions of the Law of Waters of 1866, and which went into effect in the Philippines in 1871, title to land, formed by accretions from the sea which had ceased to be washed by the tides, was vested in the riparian proprietor and that, under that law, if the government did not desire to occupy such land for the public purposes enumerated in Article 4 of the said law, and by virtue of its inherent power of eminent domain, then it was charged with the duty of confirming the title thereto, *already* vested in the riparian proprietor, "as increase of" his estate. Wherefore, it follows that, as the ownership of that part of the land in controversy which was formed by accretions from the sea since 1871,

became, under the Spanish law in force in the Philippines after that date, vested in the predecessors in interest of plaintiff in error, it is now vested in plaintiff in error.

It is, therefore, respectfully submitted that, by applying strictly legal rules of construction to the provisions of the Partidas and those of the Law of Waters, dealing with the subject of seashore, and without considering any of the equitable features of the case, the only conclusion that can be reached is that, under both laws, title to accretions from the sea, which had become dry land, vested in the riparian proprietor. But if this be not so, and even assuming that, "through a refined interpretation" of the Spanish laws, it is possible to reach an opposite conclusion, nevertheless, as all of the equities of the case are manifestly in favor of plaintiff in error which, in good faith and for a valuable consideration, purchased the land from the resident owners, and as "whatever the law upon these points may be * * * every presumption is, and ought to be, against the government in a case like the present," the plaintiff ought, we respectfully submit, to prevail.

Carino vs. Insular Government, supra.

Finally, it is respectfully submitted, that the judgment of the court below should be reversed in its entirety; but that, if this court should be of opinion that, under the Partidas, but not under the Law of Waters, land formed by accretion, after it

had ceased to be washed by the tides, became a part of the riparian estate, nevertheless, the judgment should be reversed and a new trial ordered so that it may be determined what portion of the land in controversy was formed prior to 1871, when the Law of Waters went into effect in the Philippines; for a determination of that question was denied to the parties, and the question itself rendered irrelevant, by the ruling of the trial court that, neither under the Partidas, nor under the Law of Waters, did riparian estates profit by accretion.

E. S. PILLSBURY,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
For the Plaintiff in Error.

[11374]

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

KER & COMPANY, PLAINTIFFS IN ERROR,
v.
ALBERT R. COUDEN.
No. 152.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

STATEMENT, BRIEF, AND ARGUMENT FOR THE DEFENDANT IN ERROR.

STATEMENT.

The case comes here by writ of error to the Supreme Court of the Philippine Islands to review a judgment of that court affirming a judgment of the Court of First Instance of the Province of Cavite.

The suit was in ejectment for a tract of land which is a portion of what is known as Sangley Point, in Manila Bay.

The plaintiffs, Ker & Co., are a commercial partnership, and the defendant, Albert R. Couden, is an officer of the United States Navy.

The land in controversy is a part of the United States navy yard at Cavite, and structures of various

kinds to the value of half a million dollars have been placed upon it.

The defendant is in possession of it as commandant of the navy yard at Cavite by order of his superior officers in the Navy. Prior to American occupation of the Philippines the tract formed part of the Spanish navy yard.

The plaintiffs set out to acquire the land in 1900 (R., 40), but the deeds under which they claim title were not executed until March 17, 1901, and May 5, 1902. The consideration paid is not disclosed by the record. The conveyances were made subject to the condition that (R., 36)—

> "'The vendors should not be responsible for the defense of the title to, or indemnity for the loss of, that portion of the land occupied by a coast battery, the purchasers accepting the transfer subject to such effects as may result from the present occupation of said battery by the forces of the American Government as well as to such servitudes as may have been acquired thereupon under the Spanish laws or under such laws as are actually in force.'"

The complaint

in general terms asserted ownership in fee by the plaintiffs and right to the possession of the land; that the defendant had against their will and consent taken possession of it on the 17th of November, 1902, and had retained such possession ever since, and refused to surrender his possession to the plaintiffs,

although due demand had been made therefor. (R., 28.)

The relief prayed for was a judgment for the possession of the land, and for damages in the sum of $1,500 monthly for each and every month since November 17, 1902, until possession was surrendered by defendant, with interest and costs of suit. (R., 28.)

The answer

denied the ownership of the plaintiffs and alleged affirmatively (R., 29)—

3. That the land was part of the United States navy yard at Cavite, and was held as such by the defendant under orders from his superior officers in the Navy, he being commandant of the yard.

4. That the tract in question was made land added to the old shore line by accretions and deposits caused by the action of the sea, and is part of the public domain of the Government.

5. That the United States and its predecessor in possession, Spain, through their authorized officers, have been in apparent uninterrupted possession of Sangley Point, as it grew from the accretions and deposits of the sea, for upward of 36 years prior to the commencement of the suit.

6. That the cause of action set forth in the complaint did not accrue within 36 years prior to the commencement of the suit.

And so the defendant prayed that the suit be dismissed and he be awarded his costs.

The evidence

is presented in meager abstract and as contained in the bill of exceptions relates, most of it, to the defense of limitation by more than 30 years open possession by the United States and its predecessor, Spain. Objections to the admission and to the exclusion of testimony were made on both sides and exceptions saved. (R., 30–35.) The abstract of evidence is supplemented by a review of it contained in the judgment of the Court of First Instance, which was rendered on the 14th of September, 1904. (R., 35–51.)

This judgment contained, among other things (R., 41), the following

Finding of facts.

> "As a result of the proofs introduced by both parties and of the admissions made by the plaintiffs as to the fact alleged in Paragraph 4 of the answer, the court finds and declares as proven in the present case the following facts:
>
> "1. That the land in question has been formed by accessions and accretions occasioned by the action of the sea between the year 1811 and the date of the filing of the complaint herein (December 22, 1903), a certain number of additional meters appearing from year to year from the former date until the present time.
>
> "2. That the defendant, in his official capacity of commandant of the arsenal of the United States at Cavite, and his predecessors under the late Spanish Government, have, since the year 1852, possessed as owners

in the name of the Government the land called Cañacao up to Sangley Point, with the exception of the portion at present occupied by the varadero of Manila, and have been, and still are, occupying said Sangley Point as the same has gone on increasing and advancing, up to the present time, having erected thereon the buildings set forth in defendant's Exhibit No. 3.

"3. That the heirs of Doña Bartola Franco Rodríguez Vela, by virtue of the titles which they possess to the Hacienda of San Isidro Labrador or Estanzuela, sold the land in question in this suit,—which extends from the site now occupied by the varadero to Sangley Point,—to the plaintiffs herein by public writing of March 17, 1901, which was recorded or inscribed in the Register of Property of Cavite May 23, 1901, in so far as regards the two thirds of the land sold, and, as regards the remaining third, on May 5, 1902, the deed of transfer setting forth: that 'the vendors would not be answerable for the defense of the title and indemnity for the loss of that part of the land occupied by a coast battery,' and the purchasers accepting the transfer subject to whatever results might ensue from the present occupation of said battery by the forces of the American Government, as well as subject to such servitudes as may have been constituted thereon under the Spanish laws or under the laws at present in force."

It appears from the record that in 1811 the hacienda mentioned bordered upon the sea, and that since

that year Sangley Point has been formed between it and the sea by accretions occasioned by the action of the sea. (R., 37, 49.)

The court considered at length these

Propositions of law.

> "1. Are lands formed by accessions or accretions from the sea public property, or do they belong to the owners of adjacent lands?
>
> "2. Have plaintiffs a sufficient title in law to recover from defendant the land in question in this suit?" (R., 42.)

Having determined each of these propositions adversely to the plaintiffs, the court (R., 50, 51) thus concluded its

Judgment.

> "Sufficient has been said upon the two questions discussed to render it unnecessary to discuss the defense of prescription alleged by defendant, because, the land in question being public property, it is not necessary that the Government prescribe it, because no one prescribes that which is already his.
>
> "To resume, the court finds the following conclusions of law:
>
> "1. That the land in litigation formed by deposits and accretions from the sea is public property, and can only become private property in the manner and subject to the conditions established by law.
>
> "2. That as no title from the Government or its grantees is set forth in the contract of sale upon which plaintiffs base their claim,

said contract is insufficient to entitle plaintiffs to claim restitution of the land from the defendant, whose right therein is guaranteed by law and antedates the inscription of said contract.

"3. That the defendant possessing the land in good faith and in the fulfillment of his official duties, he is under no obligation to pay any damages whatsoever.

"Wherefore, the court is of opinion that the defendant should be absolved from the complaint, with costs against plaintiffs.

"And it is so ordered."

The plaintiffs duly excepted to this judgment and moved for a new trial on the ground that the findings of fact were manifestly against the weight of the evidence, and that the judgment was contrary to law. This motion was denied, and thereupon appeal was taken to the Supreme Court of the Islands. All the evidence was sent up with the appeal. (R., 51, 52.)

Of the proceedings in the Supreme Court of the Islands we have no record except its judgment. Concerning the defense of limitation, the judgment narrates (R., 59, 60):

"'4. For special defense the defendant says, that said portion of said Point is made land added to the old shore line by accretions and deposits caused by the action of the sea and is part of the public domain of the Government.

"At the trial of the case the plaintiffs made the following admission:

"'Mr. SUTRO: The plaintiffs allege as special defense, in paragraph four of the answer, that said portion of said land was formed by lands aggregated to the line of shore by deposits and accretion caused by action of the sea; and this allegation of special defense is admitted as true by the plaintiffs with the explanation that we do not determine the date of the commencement of the accretion, which we expect the defendant shall do.'

"The court below, in view of this admission, decided that the land thus gained from the sea was public property and belonged to the State, and entered judgment for the defendant, stating that it was not necessary in the view that it took of the law to determine the other questions in the case, and particularly the defense of the statute of limitations which had been set up in the answer.

"The plaintiffs—appellants in this court—make a number of assignments of error relating, most of them, to the admission and rejection of evidence offered on the subject of the statute of limitations. The appellants say in their brief that:

"'Of course, if land formed by the action of the sea is *ipso facto* public domain, the question of prescription loses its interest and need not be considered.'

"And again:

"'It is apparent that the vital question in the case is this: Do new lands added by action of the sea to private estates become, by accession, incorporated in such estates, or are they public domain? This has been accepted by plain-

tiffs, defendant, and the trial court as the vital issue in this cause, and its determination will decide the case.'

"We think that the judgment of the court below should be affirmed, upon the ground upon which that court based its decision, and therefore the only question which we should consider is the one above referred to as quoted from the appellants' brief."

The Supreme Court of the Islands rendered its judgment on the 22d of November, 1906, affirming the judgment of the court below, and the writ of error from this court was sued out on the 22d of September, 1908. (R., 64.)

The plaintiffs make a single

Assignment of error.

"That the judgment entered herein on the 22nd day of November, 1906, is erroneous, to wit:

"It having been admitted by the parties to the action and found as a fact by the Court that the land in question in said cause was added to the land of the plaintiff by accretion, the vital question in said cause, and the only one determined by the Court, is: Do new lands added by the action of the sea to plaintiff's estates become by accretion incorporated in such estates, or are they public domain? The Court held that they are public domain, and that the land in controversy is public domain and not part of the estate of the plaintiff, and rendered judgment for defendant.

"Wherefore said plaintiff, Ker and Company, prays that the judgment of the Supreme Court of the Philippine Islands may be reversed." (R., 64.)

Counsel for the respective parties made, with respect to the hearing in this court, the following

Stipulation.

It is hereby stipulated and agreed by and between Ker & Company, plaintiff in error, and Albert R. Couden, defendant in error, represented by their respective undersigned counsel, that, inasmuch as there is no question of fact involved in the above entitled cause, the record of proceedings in the said cause to be transmitted by the Supreme Court of the Philippine Islands to the Supreme Court of the United States shall consist of the foregoing transcript of record of one hundred and seventeen pages, and that the said transcript shall be considered a complete and sufficient record of all matters necessary for a final determination by the Supreme Court of the United States of the questions of law involved in the above entitled cause. (R., 65.)

Manila, P. I., December 3, 1908.

KINNEY & LAWRENCE,
Attorneys for Plaintiff in Error.

IGNACIO VILLAMOR,
Attorney for Defendant in Error,
Attorney General for the Philippine Islands.

PROPOSITION.

The land in controversy, having been formed from time to time since the year 1811, down to the present, by accession or accretion, occasioned by the action of the sea, became, as it was formed, a part of the public domain of Spain, and, as such, became, upon the acquisition by it of the Philippine Islands, a part of the public domain of the United States.

ARGUMENT.

The case is necessarily determinable by the law of the islands as it stood when the United States acquired them.

It is agreed by the parties that the land formed by gradual accretion from the sea.

It had been in the possession of the Spanish Government and was taken into possession by the Government of the United States.

It was being held in possession by the United States and was in use as a part of its means of public defense when the plaintiffs attempted to acquire it, and they took it with notice and knowledge of all the facts, and their Philippine vendors expressly excepted from the warranty of title the rights of the United States and "such servitudes as may have been constituted thereon under the Spanish laws or under such laws as are actually in force." (R., 36.)

The Philippine courts and counsel for both parties agree that the law as to accretions prior to September 24, 1871, is to be found in the "Codigo de las Siete

Partidas." "The Compilation of the Laws of the Kingdoms of the Indies" contained nothing upon the subject, but it was provided by those laws that where they were silent the laws of Castile should be applied both as to right and remedy.

The Partidas bearing upon the case, directly or indirectly, are:

Law 1.

What is meant by dominion, and how many kinds there are.

Dominion, (*sonorie,*) is the power which one has over the things that belong to him; to do with them as he thinks fit, according to the laws of God and man. There are three kinds of dominion. The first is the absolute power enjoyed by kings and emperors, to punish malefactors, and to do justice to everyone in the kingdom. Of this we have spoken sufficiently at large in the second, and in many laws of the fourth partida, in this book. The second, is the power which a man has during his life over the moveable and immoveable things of this world; and which passes at his death, to his heirs, or to those to whom he transfers it, while living. The third is the right which a man has to the fruits and revenues of a thing, during his life, or for a certain time; or which he has to a castle, or a land which he holds by feudal tennure, as is said in the laws of this code, which speak of that matter.

Law 2.

That there is a distinction between the things of this world; that some of them belong to all creatures living, and others not.

There exists a great distinction between the things of this world. For some of them appertain to birds and beasts and all other living creatures, which use them in common with man. There are others which appertain to men only; others to the commons of towns and cities, or to castles or other places inhabited by men. There are others which belong to individuals particularly, and of which they may acquire or lose the dominion or property. And there are others the dominion of which appertains to no one, nor are reckoned among his property, as we shall hereafter shew.

Law 3.

What are the things which belong in common to all creatures living.

The things which belong in common, to all the living creatures of this world, are, the air, rain, water, *the sea and its shores;* for every living creature may use them, according to their wants. And therefore every man may enjoy the use of the sea and its shores, either for the purpose of fishing, or navigation; or doing there whatever else he may conceive advantageous to him. Nevertheless, if there be a house on the sea shore, belonging to anyone; it ought not to be pulled down, or used, in any manner, without the consent of the builder or owner. If, however, it be de-

stroyed by the sea, or otherwise; or fall to ruin; then any person may build another in its place.

Law 4.

What are the things a man may do, upon the sea shore.

Every man who chooses, may build a house or cabin upon the sea shore, as a retreat; and he may erect there, any other edifice whatever, to serve his purposes; provided he does not thereby interfere with the use of the shore, which every one has a right in common to enjoy. He may also build gallies there, or any other vessel whatever; or stretch and mend his nets; and when he is there, or employed for these or other purposes of a similar nature, no one has a right to disturb him. And by the sea shore is understood, all that space of ground covered by the waters of the sea, in their highest annual swells, whether in winter or summer.

Law 5.

That he who finds gold, pearls or precious stones on the sea shore, acquires the property of them.

Gold, pearl, and precious stones are sometimes found in the sand of the sea shore. We therefore say, that everyone who finds, and first takes possession of these things, becomes the owner of them. For as things found in such places, belong to no one, it is proper and just that they should belong to the first finder, who may take them away, and no body can oppose or hinder him.

Law 6.

That every one may make use of ports, rivers and public roads.

Rivers, ports and public roads, belong to all men in common; so that strangers coming from foreign countries, may make use of them, in the same manner, as the inhabitants of the place where they are. And though the dominion of property, (*senorio*) of the banks of rivers belongs to the owner of the adjoining estate; nevertheless, every man may make use of them, to fasten his vessel to the trees that grow there; or to refit his vessel; or to put his sails or merchandise there. So fishermen may put and expose their fish for sale there, and dry their nets; or make use of the banks for all other like purposes, which appertain to the art or trade, by which they live.

Law 26.

To whom belongs the increase which a river makes to an estate.

Rivers sometimes swell to such a height, that they carry away a portion of one estate, and join it to another, situated elsewhere, on their banks. Wherefore we say, that the earth which a *river* carries away from an estate, little by little, and imperceptibly, because not all in a body, becomes the property of him to whose estate it is carried, and he who lost it, has no claim whatever to it. But if the river carries away a part of an estate all at once in a body, whether with or without its trees;

> the earth so carried away, will not become the property of him to whose estate it is joined; unless a sufficient time had elapsed for the trees to take root there: for then this new portion of earth, becomes the property of the owner of the lands where the trees thus take root; but in that case, he will be obliged to pay the former proprietor, the damage he had sustained, according to the estimation of good men, skilled in cultivating lands. (1 Moreau and Carleton's Partidas, Edition of 1820, pp. 334 *et seq.*)

There is here declared a signal difference between the seashore and the river bank. The sea and its shore belong in common to all the living creatures of the world. And so every man may enjoy in every appropriate way the use of the sea and its shores. (*Law Third.*) But he must not interfere with that use of the shore which everyone has a right in common to enjoy. (*Law Fourth.*) And as gold, pearl, and precious stones are sometimes found in the seashore they belong to him who finds them. (*Law Fifth.*) And this must be so because the shore is common property.

The dominion or property (*senorio*) of river banks is in the owner of the adjoining estate. Others may make use of the bank, such use as is appropriate to a river bank, but, so far as consistent with that use, the owner of the adjacent estate may exercise dominion over the bank. He may cut down a tree growing upon it, provided no vessel is, or is about to be, fastened to it. (*Law Seventh.*)

Land formed by accretion becomes private property only as stated in Law Twenty-sixth, viz: "The earth which a river carries away from an estate, little by little, and imperceptibly, because not all in a body, becomes the property of him to whose estate it is carried, and he who lost it has no claim whatever to it."

Erosion of a river bank at one place means accretion at another. The erosion is from private property and the accretion is to private property. The loss and the gain are imperceptible, and the particular source from which the gain comes is usually not distinguishable. The law determines as between private owners that what is thus imperceptibly added to a river bank shall accrue to the adjacent owner.

The seashore is "all that space of ground covered by the waters of the sea, in their highest annual swells, whether in winter or summer." (*Law Fourth.*) But this shore belongs "in common, to all the living creatures of this world." (*Law Third.*) The imperceptible erosion from this is from common property and the imperceptible accretion to it is also to common property.

The argument of the plaintiffs that under the laws of the Partidas, which we are considering, land is shore only while actually washed by the tides, and as soon as by accretion it is raised above the tide level it ceases to be shore and belongs to the adjacent estate, begs the whole question. The shore or beach as it may be at any time belongs to the state. The question is, To whom belongs the accretion to it?

Undoubtedly if there is accretion the shore line changes—advances toward the sea—but whose is the made land? The Island Courts said it was the land of the public, because it was an accretion to the shore or beach, which was the property of the public. The shore is susceptible of accession and the accessory follows the principal.

Upon the principle of "*expressio unius*" the same result follows. The Partidas define what may be private property, and how dominion or property may be acquired. The whole of Partida Third, Title Twenty-eight, with its 50 laws, deals with this. It enters into great detail as to the things to which private dominion extends and how it may be acquired. That dominion is in express terms extended to river banks and their accretions. It is in as express terms withheld from the seashore, which is declared to be public property, and it is not extended to accretions to the shore.

The Law of Waters of August 3, 1866, was promulgated and became effective in the Philippine Islands on September 24, 1871.

The Law of Waters differs from the Partidas in some details, but it rests upon the same principle, that the seashore or beach is public property.

This law provides:

> ART. 1. The following are a part of the national domain and for public use * * * (3) The shores (playas). By shore it is understood that space alternately covered and uncovered by the waters in the movement of the

tide. Its interior or terrestial limit is the line reached by the highest equinoctial tides. Where the tides are not perceptible, the shore begins on the land side at the line reached by the sea during ordinary storms and tempests.

ART. 4. *Lands which attach themselves to the shore by accretions and deposits caused by the sea, are of public ownership.* When they are no longer washed by the waters of the sea and necessary for purposes of public utility, nor for the establishment of special industries, nor for the coast guard service, the Government shall declare them to be the property of the owners of adjacent estates and a part thereof.

ART. 8. The estates adjacent to the sea or to its shores are subject to easements in favor of salvage and coast police.

ART. 9. The easement of salvage comprises a zone of 20 meters, measured landward from the interior limit of the shore, and public use shall be made thereof in cases of wrecks for the salvage and deposit of the remains, effects, and cargoes of ships wrecked. Furthermore, fishing-boats may ground in said zone, when they are compelled to do so by stress of weather, and may temporarily deposit their effects on the land, but without injury to the estates. This terrestial or salvage coast zone shall advance as the sea recedes, and shall recede as the sea advances, for it shall always lie adjacent to the shore.

ART. 10. The easement of coast police shall consist in the obligation to leave clear a road, not to exceed six meters in breadth and

> marked off by the public administration. This road shall lie within the terrestial coast zone referred to in the preceding article. * * *

Here easements are imposed upon estates adjacent to the sea, an easement of salvage and refuge from storm of 20 meters in width, and an easement of police of 6 meters in width.

Article 4 declares in terms that accretions to the shore caused by the action of the sea are public domain, but provides that when they are no longer washed by the sea, and the general welfare permits, the Government shall declare them the property of the adjacent estates.

There is no pretense of such a declaration here, and, on the contrary, there is the positive evidence that the land was used by the Spanish Government, as by our own, for public purposes.

Plaintiffs contend that this law does not declare accretions to the seashore to be public domain.

The argument, extended throughout many pages, is to the effect that "the accretion which article 4 declares to be public property, is the accretion from the sea which increases the area of the tide lands." (Brief, p. 46.)

We may concede, as plaintiffs say, that "it must be perfectly clear that, by reason of accretion, the area of tide lands may be increased without the line of high tide either advancing or receding," but it remains true that article 4 is not so limited.

It says not that the *tide lands*, but that "the *lands added to the shores* by accretion and deposits, caused

by the action of the sea, are part of the public domain." And, beyond this, it is plainly stated that these lands so added to the shores may be used for purposes of public utility, or for the establishment of special industries, or for the coast-guard service, and when not necessary for these uses they shall be added to the adjacent estates.

In plaintiffs' view, only tide-swept lands were contemplated for such uses, and tide-swept lands not necessary for such uses must be declared to be part of the adjacent estates. In other words, under the plaintiffs' construction only the shore is comprehended within the terms of article 4, and not that which is the sole and specific subject of article 4, viz: "*The lands added to the shores* by accretions and deposits, caused by the action of the sea."

Article 1 deals with the shore itself, and declares that to be "a part of the national domain and for public use;" and it defines that "by shore is understood that space alternately covered and uncovered by the waters in the movement of the tide." Here all tide-swept lands are embraced. To preclude all doubt the article proceeds: "Its interior or terrestial limit is the line reached by the highest equinoctial tides. Where the tides are not perceptible, the shore begins on the land side at the line reached by the sea during ordinary storms and tempests."

Spanish commentators upon the law of Spain support the position of the Government.

Arrazola in his Enciclopedia Española, Derecho y Administracion, Madrid, 1849, volume 2, pages 580

to 583, deals with the question of accretion under the Partidas and when the right to it occurs, and when not, and in the course of his article says (p. 582):

> Nor does there exist any right of accretion with respect to the changes made by the sea which leave above water mark any piece of land adjoining the fields or the beach. The French law has thought it proper to expressly decide this point in the manner above stated, but it should be sufficient to remember that these lands are considered as appertaining to the public domain in order to so determine in all cases, even if there should be no final decision to that effect.

We find in the article no warrant for plaintiffs' comment "that what Arrazola was referring to was not land formed by accretion, but land left below ordinary high-water mark by the sudden recession of the sea." (Brief, p. 37.) Arrazola does not use the word "sudden," nor any synonym of it. He does not speak of a "recession of the sea," but of changes made by the sea. Neither does he speak of "land left below ordinary high-water mark" and still "left dry." Arrazola knew that there could be no recession of the sea in the sense suggested by the plaintiffs. The sea may apparently recede by the changes which it makes in the land, but its own level is not lowered in fact, and only by an actual lowering of its level could we have the phenomenon of "land left below ordinary high-water mark by the sudden recession of the sea," and "left dry." Rivers at times recede below

ordinary high-water mark and remain at lower stage for years and mayhap forever; lakes and ponds recede and even become entirely dry, but not so the sea.

Gutierrez Fernandez, professor of law in Central University and a member of the Madrid bar, in his Treatise Codigos ó Estudios Fundamentales, volume 2, page 86, commenting upon the fourth article of the Law of Waters, says:

> Upon the principle that the accessory follows the principal, it is declared with rigorous logic that the accession to a shore becomes public property; that where the specified reason set forth or some other object of common interest failed to exist, the increase shall be declared to be property of the owners of the adjacent estates.

This is disposed of by plaintiffs as being a comment on article 2 of the Law of Ports of 1880, but the edition of Gutierrez from which we quote was published in 1875, and it quotes the full text of article 4 of the Law of Waters, and the comment we have quoted relates exclusively to article 4 of the Law of Waters.

Alcubilla, in his Diccionario de la Administracion Española, edition of 1887, volume 7, page 108, gives us note of a decision on the Jurisdiction of the Administration over the Shores:

> The administration, apart from the ownership of the shores, has the right to prescribe rules for their use, and to survey and mark off the lands which constitute them.

The Court of First Instance cites also two judgments of the Supreme Tribunal of Spain, one of April 30 and another of May 10, 1863, to the effect that the Government may give in lease or emphyteusis all lands comprised in the beach or shore of the sea, and may grant concessions of lands gained from the sea, making for the purpose special rules which grant and create rights of exclusive possession and use.

This was under the Partidas, being eight years before the Law of Waters of 1866 went into effect.

Plaintiffs say that under the civil law accretions made by the sea go to the adjacent owner; and they cite a number of English writers in support of their statement. The Partidas, it is further said, were derived from the civil law, and indeed are often expressed in the very terms of the Justinian Code. So it is argued the Partidas must mean what the English writers say the civil law meant on this subject. Angell on Tide Waters distinctly states that the law of accretions, as contended for by the plaintiffs, "is the doctrine of the Roman, French, Spanish, and Louisiana jurisprudence."

Angell, however, is mistaken. The countries named by him do all of them declare a contrary rule as to accretions made by action of the sea.

Article 454 of the Civil Code of Italy, 1865, provides:

> The land abandoned by the rivers belongs also by alluvion to the owner of the uncovered shore, and the owner of the opposite shore has

no claim to the land lost. *This right does not lie as to lands abandoned by the sea.*

Section 556 of the Code Napoleon provides that the accumulation and increase of mud formed successively and imperceptibly on soil bordering on a river or other stream is denominated alluvion, and that alluvion belongs to the proprietor of the bank.

Section 557 provides that it is the same with regard to derelictions occasioned by a running stream retiring insensibly from one of its banks, but this right does not take place with regard to derelictions of the sea.

Marcadé, commenting upon the above sections of the code, says:

> All the accretion which is formed upon an estate of a riparian owner becomes by accretion a part of the estate, and belongs consequently to the owner of the same. Alluvion is the increase which the water forms successively, little by little, whether by deposits of the earth which it brings up or by imperceptibly uncovering the lands which it formerly covered.
>
> *Thus the alluvion (les lais et relais) which the sea forms upon its shores belongs to the State together with its shores;* the islands which spring up in a navigable stream belong likewise to the State, because it is the proprietor of the bed of which those islands are a part.

(Explication, du Code Napoléon, 5th ed., vol. 2, p. 439.)

Littré, in his French Dictionary, defines "lais" as meaning in law "alluvion." He adds that "les lais et relais" is simply another expression for the same thing.

Section 557 of the present Civil Code of France, as translated by Blackwood Wright, provides:

> The same principles (to wit, the principle of alluvion accruing to the benefit of the riparian owner) applies to the old banks formed by the stream and left dry by the stream, having gradually retired from one shore and flowing against the other shore. The owner on whose side the shore has been left dry is entitled to such alluvion, and the riparian owner on the other bank is not entitled to claim the soil that he has lost. *This right does not apply to any ancient shore of the sea which may have been left high and dry.*

The Digest of Civil Laws in force in 1808 in Orleans Territory, book 2, page 106, provides:

> ART. 13. The sand bars and accretions, which form themselves successively and imperceptibly to any soil situated on the shore of a river or creek, are called alluvions. The alluvion belongs to the owner of the soil situated on the edge of the water, whether it be a river or a creek, and whether same be navigable or not.
>
> ART. 14. The same rule applies to derelictions (relais) formed by running water retiring imperceptibly from one of its shores and encroaching on the other, the owner of the land adjoining the uncovered shore has a right to the dereliction (alluvion), nor can

the owner on the opposite shore claim on this side, the land which he has there lost.

This right does not take place in derelictions (relais) of the sea.

The substantially identical provision of the Code of 1870 was involved in *Zeller, widow,* v. *Yacht Club* (34 La. Ann., 837). After citing the code the court say (p. 839):

> "*Et quidem naturali jure communia sunt omnium haec, aer aqua pro fluens, mare, et per hoc littera maris.*"
>
> "*Est autem littum maris quatenas hybernas fluctus maximus excurrit.*" Justinian, Ins. lib. 2, tit. 1, sec. 1–3.
>
> The plaintiff, however, denies that Lake Ponchartrain is either the sea or an arm of the sea, and, therefore, contends that this question of accretions or alluvion on the sea shores has no applicability to this case. It might be a sufficient reply to this, to say, that *the only acknowledged right to accretions as property under our law, are those formed on rivers and running streams; and that there is no recognition of any property right therein, when formed on lakes, bays, arms of the sea, or other large bodies of water,* and that the modes or ways of the acquisition of property are limited to those expressly prescribed by law and cannot be extended by implication. But we consider this question virtually disposed of in the case of Milne vs. Girodeau, 12 L. 324. That was a petitory action to recover a lot lying on the same body of water, Lake Ponchartrain. On this lot the defendant had erected buildings.

In the opinion of the Court it is stated:

"The defendant, who is in possession, avers in his answer that it makes a part of the seashore, is common property, and that plaintiff cannot have the ownership thereof.

"It appears to us that the ground in question lies much below high water mark, and forms part of the bed of the lake, and is not, therefore, susceptible of private ownership."

The Spanish law does now certainly make public property of all accretions to the seashore, with provision for private ownership when there appears to be no occasion for public use. This is true under the Law of Waters of 1866 and as well under the Law of Ports of 1880.

With Spain, France, Italy, and Louisiana concurring in their codifications that the dominion over accretions made by the sea was in the public, the presumption is overwhelming that this was the principle of their customary law, and was their construction of the civil law.

Amandi, quoted by plaintiffs, states the question, "Do lands bounded by the sea enjoy the right of alluvion?" to have been involved in some doubt under the ancient law, and was disposed to resolve that doubt in favor of the private owner.

Scaevola says that the Law of Ports of 1880 established a different doctrine from the ancient law, and Escriche, in his Dictionary of Law, dealing with the Partidas, asserts the right of private property in accretions made by the sea.

The weight of authority is, however, decidedly against these writers.

There is absolutely no authority to support the contention of plaintiffs as to accretions made since the Law of Waters of 1866 went into effect.

It is claimed that this law is inoperative, unconstitutional as destructive of vested rights, and American authorities are cited to support the contention.

No Spanish authority, however, questions the validity of either the Law of Waters of 1866 or the Law of Ports of 1880. These laws, essentially the same as to the matter in hand, are accepted as valid in the jurisprudence of Spain alike by those authorities which hold them to be a modification of the Partidas in favor of the adjacent owners and those which hold them to be a modification of the ancient law in favor of the public.

The former owners themselves so dealt with this very land. They believed that the Law of Waters applied, that the State had the prior and paramount right to the land and could use it for a public purpose, and that the right of the adjacent owner attached only when the lands were to be put to private use.

In 1881 it was proposed to establish a dry dock as a private enterprise on Sangley Point, and the then owner, Doña Maria Bartola Franco, a resident of Cavite, presented a memorial asserting a right to the land as against this private enterprise. Upon this memorial Don José Montojo, officer of the Spanish

Navy and general commandant of the arsenal at Cavite, made a report which, so far as contained in the record, recites (p. 39):

> " * * * 'On September 19, 1881, Doña María Bartola Franco, then a resident of Cavite, now deceased, presented a memorial to the general commandant of the naval station, *explaining that it was not her intention to claim the lands upon which are situated the various outhouses of the navy used for the deposit of coal, upon which the hospital is erected, and barracks for the marines have recently been constructed, and upon which are various other buildings pertaining to the marine corps,* but that, being aware that a private enterprise proposed to establish thereon a dry dock, she prayed that she should be declared to be the owner of par of the land occupied by the navy (marina); which said memorial was, in accordance with the opinion of the Ultimo Auditor de Marina, disallowed by decree of September 29, 1881. * * * The rights of the navy to the lands whereon were situated their buildings, which latter were essential to the various services and necessities of the Government, were derived indubitably from the very nature and topographical situation of the land, situated as is the latter upon the seashore, which rights are defined and governed by the general laws of the country which treat of the ownership of waters, their shores, beaches, maritime war zones, etc., etc.'"

On October 6, 1881, Doña María filed an opposition to the establishment of this varadero, or dry dock, in which she recited (R., 38):

> "* * * 'When I bought from its former owners the Hacienda of San Isidro Labrador or Estenzuela, including Sangley Point or Cañacao, the navy was already established therein, although at that time it did not possess the full extent of land which it enjoys today.'"

Evidently the persons building the dry dock made some adjustment with the adjacent proprietors, for plaintiffs' Exhibit CC, dated March 29, 1884—

> "is a document by virtue of which the Rodriguez family waived in favor of the petitioner for the concession for the varadero all claims which the former might have on the land of the varadero, and in said document it is set forth: 'that no one excepting the Navy or the Government, which is occupying it, may allege or claim any right or title whatsoever to said land,' and in the same document the vendors bound themselves to protect the purchasers against all claimants except the navy or the Government, in regard to which latter they assumed no obligation whatsoever." (R., 40.)

And finally when the conveyance was made to the plaintiffs it was subject to the condition that—

> "* * * 'The vendors should not be responsible for the defense of the title to, or indemnity for the loss of, that portion of the

> land occupied by a coast battery, the purchasers accepting the transfer subject to such effects as may result from the present occupation of said battery by the forces of the American Government as well as to such servitudes as may have been acquired thereupon under the Spanish laws or under such laws as are actually in force.'" (R., 36.)

The owners of the Hacienda had a certain right in the lands formed by accretion—the right granted by the Law of Waters in the provision of article 4, that "when they are no longer washed by the waters of the sea and are not necessary for purposes of public utility, nor for the establishment of special industries, nor for the coast guard service, the Government shall declare them to be the property of adjacent estates and a part thereof."

When what they deemed to be a private interest sought to acquire a portion of the accreted lands, they asserted against that, what they believed to be their right as prescribed by the Law of Waters, always recognizing the public dominion and acquiescing in the public possession for public use, and they did this in the very conveyances under which the plaintiffs claim.

Plaintiffs cite the case of *Carino* v. *Insular Government* (212 U. S., 449). Carino was a poor Igorot, who was menaced with the loss of the land which had been his home and the home of his fathers as far back as memory could go, and all because he had failed to comply with some ceremonials of registration, of which he had no knowledge, and having

knowledge could have no understanding. Of him and of the attempt to deprive him of his home this court said (p. 460):

> Certainly in a case like this if there is doubt or ambiguity in the Spanish law we ought to give the applicant the benefit of the doubt.

Plaintiffs quote this and invoke the same liberality of judgment for themselves, who, they say, "in good faith, and for a valuable consideration, purchased the land from the resident owners." (Plaintiffs' brief, p. 56.)

If, indeed, they are in like case with Carino, they should have the same rule.

What are the facts as disclosed by the record? How valuable the consideration was which they paid we do not know, for the record does not show. We may infer something from the fact that the vendors would not warrant the title.

The record does show that here was a tract of land of about 37 acres in extent made by the sea. It had long been in the possession of the Spanish Government and was now in possession of the Government of the United States. That Government was at war. There was an insurrection in the islands, and this land, with the structures upon it, was one of the national defenses.

This land was not the home of the plaintiffs and had never been the home of their fathers. They were strangers to it. They looked upon it and they longed for it, and their vision, sharpened by greed,

discovered what they believed to be a flaw in the title of the Government. They were willing to do what the owners of the adjacent estate were not willing to do, that is, to speculate against their Government upon this supposed defect, and they made their arrangements accordingly. They went upon a portion of the land in December, 1900, and cleared away some weeds and brush, hoping thus to break the continuity of the adverse possession against them; but in February, 1901, they were driven off by the Navy of the United States. (R., 38.) They persisted in their purpose, nevertheless, and got formal conveyances of the land on March 17, 1901, and May 5, 1902; and they were content to take conveyances which by their restrictions of warranty disparaged the purpose for which they got them. (R., 41.) Defeated in their endeavor by the courts of the islands, which held the law to be against them, they appeal to this court for consideration upon "the equities of the case," and ask the court to declare as it did in behalf of the Igorot that "whatever the law upon these points may be . . . every presumption is, and ought to be, against the Government in a case like the present." (Brief, p. 56.)

The facts of this case are a sufficient comment upon its equities.

It is respectfully submitted that the judgment herein should be affirmed.

F. W. LEHMANN,
Solicitor General.

APRIL, 1911.

O

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 152.

KER & COMPANY, PLAINTIFF IN ERROR,

vs.

ALBERT R. COUDEN, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The following brief in reply presented by permission of the court divides itself into three parts:

I. Citation of additional authorities and considerations in support of the propositions presented in the opening brief.

II. Reply to the brief of the honorable the Solicitor General.

III. "The equities of the case" and the record.

I.

Additional Authorities and Considerations.

It is conceded that both at the civil law and at the common law additions to the *shore* belong to the State. But we distinguish between accretions to the shore and to the estate adjacent thereto.

In 2 Hall's American Law Journal, at pages 307, *et seq.*, are found some authorities on the state of the French law on the subject:

(*a*) *Guyot's Repertoire Universelle* (cited at page 324), which we translate as follows:

> "Alluvion, increase of land which is made little by little on the borders of the sea, of streams and of rivers by lands which the water brings there. The Roman law places alluvion in the category of the means of acquiring property by the law of Nations as being a species of accession; so that the accretion made imperceptibly becomes a part of the heritage to which it is found added. This is founded on the maxim which provides that the 'gain appertains to him who is exposed to suffer the damage.'"

(*b*) Article by Lavasle, found at page 328 of the same volume (referred to in the argument of M. Derbigny, 2 Hall's American Law Journal, p. 298):

> "Alluvion is an increase of the ground which takes place by slow degrees, on the

shores of the sea, on the borders of streams and rivers; occasioned by the earth which the water conveys and which becomes so consolidated with the contiguous land that it forms a *whole with it—an identity.* The name of alluvion is also given to those lands which are slowly and imperceptibly left uncovered by the water.

"The Roman law places alluvions in the number of the means of acquiring according to the laws of nations, as being a kind of accession; that augmentation, being operated in a slow and imperceptible manner, remains to the inheritance, to which it is found united.

"The portion which is thus added insensibly is not considered as new land, it is a part of the old which becomes possessed of the same qualities, and it belongs to the same owner—*in the same manner as the growth of a tree from parts of the tree*—and is the property of the proprietor of the tree. The right of increase by alluvion is grounded in the maxim of right which bestows the profits, and the advantages of a thing, to him who is exposed to suffer its damages and its losses.

"The alluvions which the sea produces on the lands which it bathes, also belong, as a right of increase, to the proprietor of those inheritances, who may also make levees or dikes to secure them." (Italics ours.)

(*c*) Desinart (same volume, p. 329) says:

"1. Alluvion is an accretion which is made imperceptibly, little by little, upon the borders of the sea, of streams and rivers, by lands which the water carries there.

> "2. When by alluvion an estate is imperceptibly increased the increase belongs to the owner and he whose estate is decreased in this manner cannot recover what is wanting to him.
>
> "This is the maxim of the Roman law which is in effect in France, except in Franche Comte."

(*d*) We also repeat here a more complete translation of the pronouncement of Escriche, a member of the highest court of Spain, on this subject. After citing Gaius and the Partidas law 26, title 28, part 3, Escriche says:

> "Alluvion which the sea adds to the hereditament situated on its shores also belongs by right of accession to the owners of said hereditaments who may construct dikes to preserve them."
>
> Diccionario Title "Aluvion."

The difference between title to land formed by accretion by the sea and that which is formed by retirement of the sea is recognized by Ferriere in his commentary on the Institutes of Justinian and in his analysis of the French law, reported at page 333, in a note in volume 2, Hall's American Law Journal. The distinction is also pointed out in the case of County of St. Clair *vs.* Lovingston, 23 Wallace, page 46.

If the law of waters of 1866 (whereof all applicable provisions are quoted at page 42 of our brief) were construed to have changed the previ-

ous law, there would be an illegal interference with the vested right of the owners of adjacent estates. Such is the holding of the cases in 23rd Wallace and in the 18th La. reports cited in our brief at pages 39 to 40. Supplementing the argument made on this point in our opening brief, we refer to the Constitution of Spain of 1837, article 10; the Constitution of 1869, articles 13 and 14, and to the Constitution of 1876, article 10, all of which are found in a publication containing the Constitutions of Spain, printed at Madrid in 1886, in volume 1 of "Constitutions of Spain and of other nations of Europe," chapter J. N. 8107 of the Congressional Library. We quote the provisions of the Constitutions of 1869 and of 1876:

"Constitution of 1869, Article XIII.

"Nobody can be deprived temporarily or perpetually of his property and rights, nor disturbed in possession, except by virtue of a judicial judgment. *Public officials who shall under pretext infringe this provision will be personally responsible for an injury caused.*" (Italics ours.)

"Article XIV. Nobody can be deprived of his property" (the word here translated, "deprived," carries the idea of expropriation, the Spanish word being "expropriado") "except for reasons of public utility and by virtue of judicial decree, which will not be executed without the previous indemnification regulated by the judge upon the appearance of the party interested."

Constitutions of Spain, volume 1, p. 124.

"Constitution of 1876, Article X.

"Penalty of confiscation of property shall never be imposed, nor shall any one be deprived of his property except by competent authority and for reasons justified by public utility. Always provided that there shall have been appropriate indemnification. If this prerequisite is not had the judges will protect and in a proper case reinstate the person deprived (expropriated) in his possession."

Constitutions of Spain, vol. 1, p. 147.

Nor, we take it, will this court favor a construction of a staute of the crown of Spain violative of the public policy and fundamental rights upon which this Government rests. There is, however, in the Spanish constitutional law a perfectly clear provision that in the case of omission to indemnify him whose property is expropriated the judge "will protect and in a proper case reinstate the person deprived, in his possession."

See the Constitution of 1876, *supra*.

And there should also be noted particularly the provision of article XIII of the Constitution of 1869, by which public officials infringing the right of indemnification for expropriated property are personally responsible.

It is our argument that this court should, as is reasonably possible, give a construction to the Law of Waters harmonious with these constitutional provisions and with our own fundamental law.

II.

Reply to the Brief of the Solicitor General.

1. *Authorities Cited by the Solicitor General.*

We propose to make a brief reference to each of the authorities cited by the learned Solicitor General in order to point out what we conceive to be the inapplicability thereof to the question in hand.

(*a*) Zeller *vs.* Yacht Club, 34 La. An., 837:

It does not appear from the report of the case whether the land involved was or was not subject to the flow of waters at high tide. If it was, the case has, of course, no application to the case at bar. The opinion itself leads to the inference that the land in controversy did not lie above the highest waters of the lake. The decision is rested on the case cited in the briefs reported in 12 L. R., 324, which decided that land lying below high-water mark is not susceptible of private ownership.

We quote the following from the opinion of the Zeller case:

> "The next article of the Code following the one recognizing accretions or alluvion on rivers becoming the property of the owners of the contiguous soil declares:
>
> " 'The same rule applies to derelictions by running water retiring imperceptibly from one of its shores and encroaching on the other; the owner of the land adjoining the

shore left dry has the right to the derelic-tion.' This right does not take place in case of derelictions of the sea." See 510.

"*Et quidem naturali jure communia sunt omnium haec, aer aqua pro fluens, mare, et per hoc littera maris.*"

"*Est utem littum maris quatenas hybernas fluctus maximus excurrit.*" Justinian, Ins. lib. 2, tit. 1, sec. 1-3.

"The plaintiff, however, denies that Lake Pontchartrain is either the sea or an arm of the sea, and, therefore, contends that this question of accretions or alluvion on the sea shores has no applicability to this case. It might be a sufficient reply to this to say that the only ackonwledged right to accretions as property under our law, are those formed on rivers and running streams; and that there is no recognition of any property right therein, when formed on lakes, bays, arms of the sea, or other large bodies of water, and that the modes or ways of the acquisition of property are limited to those expressly prescribed by law and cannot be extended by implication. But we consider this question virtually disposed of in the case of Milne *vs.* Girodeau, 12 L., 324. That was a petitory action to recover a lot lying on the same body of water, Lake Pontchartrain. On this lot the defendant had erected buildings.

In the opinion of the court it is stated:

" 'The defendant, who is in possession, avers in his answer that it makes a part of the seashore, is common property, and that plaintiff cannot have the ownership thereof.

"It appears to us that the ground in question lies much below high-water mark, and

forms part of the bed of the lake, and is not, therefore, susceptible of private ownership.' "

It is pointed out in the brief of the Solicitor General that "lais and relais" "is simply another expression for the same thing" (Brief of Solicitor General, p. 26), and he quotes Littre as defining "lais" as meaning in law "alluvion" (at p. 26).

Evidently the Louisiana courts have interpreted the word "derelictions" (La. Code, art. 510) as embracing *lais* and *relais*, thus finding in the Code a statutory exception to the general rule of the civil law. The citation of section 510 of the Louisiana Code in immediate proximity to the part of the decision above quoted indicates that it was the ground of the court's ruling. But the provision of that section is not found in the Partidas (which govern this case as to the time prior to 1871), nor in the Justinian Code on which the Partidas are founded.

In connection with the Zeller case, we refer to

(*b*) Marcade cited by the Honorable Solicitor General at page 25 of his brief. The doctrine there laid down is, that what is *added to the shore* belongs to the Crown, and is conceded by us to be correct. It is not only the law of those countries which follow the Roman law, but it is also the common law. If the rule be enlarged to cover accretions to the *land* bordering upon the shore the rule must, of course, find its sanction in statutory provisions.

In our brief, at page 47, we cited Bell's "Law of Scotland" upon the proposition that what is gained to the "*land*" belongs to the owner of the land, but what is gained to the "*shore*" is added to the right of the crown, a distinction which we submit is sound and reasonable. Whatever is added to the shore must of necessity be shore and, as such, not susceptible of private ownership and the shore at the civil laws extends to that part of the land washed by the highest tides. (See authorities cited in our brief, page 11.)

The law of waters itself furnishes the definition of shore as: "That space alternately covered and uncovered by the waters in the movement of the tide." When the land ceases to be so covered, it ceases to be shore.

(*c*) We make the same observations concerning section 557 of the Civil Code of France as translated by Blackwood Wright, and the Digest of Civil Laws in force in 1808 in Orleans Territory, book 2, p. 106, cited in the Government brief. Indeed, the latter provision is practically section 510 of the Louisiana Code.

(*d*) The citation from Arrazola in the Government brief deals with *deviations* of the sea. The opinion of the Supreme Court of the Philippine Islands at page 58 of the record (being there found in Spanish), quotes this authority and it is seen that the word used by Arrazola is "desviacion."

which, according to the dictionary of Lopez and Bensley, edition of 1898, means "a turning away," "a deviation." There is, of course, no contention that land left dry by sudden or other change in the course of the sea is not the property of the Crown. It is the second of the three forms of marine increase cited by Angell in his work on "Tide Waters" and which he distinguishes from accretions by the sea, saying that under the civil law the former belonged to the owner of the riparian estate and the latter to the Crown. (See Angell on Tide Waters, 2d edition, page 249.) The same rule is laid down by Farnham, "Water and Water Rights," vol. 1, page 329, edition of 1904.

(*e*) The citation from Alcubilla, page 23, referring to the right of the administration to prescribe the use of the shores, does not conflict with anything for which we contend, but, on the contrary, we concede that the State owns and controls the shores and in that capacity may prescribe their use.

(*f*) We make the same answer to the reference to the two judgments of the supreme tribunal of Spain at page 24 of the brief of the Solicitor General.

We rest our contention as to the state of the law upon the reasonableness of the rule for which we contend and upon the following authorities, all of

which, cited in our opening brief or herein, express the view that accretions by the sea to the *land* adjoining the *shore* belong to the owner of the adjacent land:

Escriche, cited herein.
Lavasle, cited herein.
Guyot, cited herein.
Desinart, cited herein.
Amandi, cited in our opening brief, p. 37.
Scaevola, cited in our opening brief, p. 38.
Bracton, cited in our opening brief, p. 34.
Hale "De jure Maris," cited in our opening brief, p. 32.
Angell, Tide Waters, 2d ed., p. 249, cited in our opening brief, p. 33.
Browne, on Roman Law, 2d ed., p. 239, cited in our opening brief, p. 32.
Lord Mackenzie, Roman Law, p. 177, cited in our opening brief, p. 33.

III.

"Equities of the Case" and the Record.

Counsel in the lower courts expressed the view that a finding of law that accretion by the sea could under no circumstances belong to the owner of the adjoining estate, would end the case. It appears from the opinion of the Supreme Court of the Philippines (Record, bottom of page 59) that the appellants in their brief in that court said:

> "It is apparent that the vital question in the case is this: Do new lands added by action of the sea to private estates become, by accession, incorporated in such estates, or are they public domain? *This has been accepted by plaintiffs, defendant, and the trial court* as the vital issue in this cause, and its determination will decide the case." (Italics ours.)

and it was accepted as the vital issue by the Supreme Court below.

One of the positions taken by plaintiffs rested on the registry and inscription under the mortgage law of Spain of the title which plaintiffs purchased. This position the Supreme Court of the Philippines rejected *on the ground* that lands formed by the accretion of the sea could not become private property and, therefore, could not be inscribed under the law the protection whereof was invoked by plaintiffs. (See Record, pp. 62-63.) Should it now appear that the court below was in error on the law of accretion, will this court say that, in the absence of that error, its ruling would not have been in favor of plaintiffs on the conclusiveness of the registry of the title?

The record contains an abstract of *some* of the proceedings of the court of first instance. *Some* of the findings of the trial court have been dwelt upon by the Honorable Solicitor General, both in his argument and in his brief, as demonstrating the unmeritorious character of the claim of the plaintiff in error. That these findings are absolutely un-

supported by the evidence, that some of them constituted an entire misapprehension of the facts, and that they are accompanied by the most glaring omission of other facts which would completely negative the conclusions drawn, were matters not open to the plaintiff in error to present. *The judge of the Court of First Instance, whose findings are thus referred to, was afterwards the Attorney General of the Philippine Islands, who stipulated* with counsel for plaintiff in error that no question of fact was involved in the cause (Record, p. 65). If he believed the record to fairly present the case on a question of law, should we now be met with the contention of the Government that questions of fact must also here be met? Is it not manifest that plaintiff in error could gain nothing by printing an enormous record and arguing voluminous contentions of the Government on the facts until the adverse ruling of the lower court on the question of accretion is disposed of?

The exhibits referred to in the bill of exceptions which was presented to the Supreme Court of the Philippines and which are referred to at pages 36 and 37 of the record, showing the chain of title of the plaintiffs in error, including the judicial proceedings concerning the title, were not annexed to the transcript of the record sent to this court, and this is explained by the stipulation found at page 65 of the record, and which naturally followed upon the decision of the Supreme Court below.

Could it, indeed, alter this case, as it is presented

to this court, if it were shown that Ker & Co., the plaintiffs in error, are not "land speculators," but the oldest English-speaking firm in Manila; that they purchased for one hundred thousand dollars the land in question for the construction of ship-yards thereon; that they made this purchase after consulting Enrique Barrerra, a most distinguished notary in Manila, and a witness in the case, as appears from the record at page 34; that Enrique Barrerra advised the plaintiffs in error that the title was good; that a warranty of title was given to Ker & Co. for the entire 147,000 square meters in question excepting only 12,000 square meters used for a time for the purposes of a coast battery?

Could the court's decision here depend on these matters?

Could it change the views of the court on the question of law here submitted if it were established that in a proceeding *in rem* the predecessors in interest of the plaintiffs in error had established their title to all the land of the hacienda, including that then formed by accretion, and that in that proceeding the Government of Spain was represented, and that it resulted in a judgment in favor of the predecessors of interest of the plaintiffs in error; that but little of the land in controversy was ever occupied at all by strangers to plaintiffs' title, and then only temporarily; that the ship yard (varadero) referred to by the Solicitor General was constructed only after the objections of the protestants, plaintiffs' predecessors, had been

compromised; that the record title of the predecessors in interest of the plaintiffs in error was a good record title, and that the plaintiffs in error were entitled to rely upon it; that the Supreme Court of the Islands (Record, pp. 62 and 63) ruled against the plaintiffs in error as to the conclusiveness of the record title only because the court came to the conclusion that land formed by accretion of the sea could never become private property and, therefore, could never be inscribed?

Would this court do justice to the plaintiffs in error in basing a decision wholly or in part upon a want of facts, the omission whereof was plainly induced by the position of the Government and the courts below? In justice should not this court first pass upon the record as it is presented and give plaintiffs in error their day to offer in a proper record such facts as they may adduce to show the equitableness of their suit? Sufficient appears in the record to show that plaintiffs deraign title as far back as 1804 and always was the title described as Sangley Point—the bay was always the boundary line. Plaintiffs in error here have no cause to fear "color" in the case; it is the Government, not the plaintiffs, whose case rests on a "flaw" in the title.

But it is most unfair, we submit, to rest the statement of the "color" in the case wholly upon the *partial* facts found by a trial court in an opinion written to sustain its conclusions of law on other defenses than are here urged.

Are not the plaintiffs in error entitled to the presumption that the consideration paid by them for the land was valuable, and does it not appear from the opinion of the Supreme Court of the Philippines, pages 62 to 64, that the title to the land which the plaintiff in error bought was on the record a good title, inscribed in accordance with the provisions of the real property law governing the Philippines?

Is it the position of the Government in this case that the court should allow the "color" in the case, as it appears from an imperfect record (and incorrectly appears), to affect a determination of a pure question of law which the Supreme Court of the Islands, the judge who first tried the cause, and the Attorney General of the Islands, and the counsel for the plaintiffs in error have all agreed is the question upon which the rights of the parties depend?

We respectfully submit that the judgment should be reversed.

E. S. PILLSBURY,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
OSCAR SUTRO,
For the Plaintiffs in Error.

KER AND COMPANY *v.* COUDEN.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 11. Argued January 27, 1912.—Decided February 19, 1912.

The question of ownership under the Spanish law of accessions to the shore by accretion and alluvion has been a vexed one.

The Roman law is not like a deed or a modern code prepared *uno flatu*, but history has played a large part in its development.

Under the civil law, the seashore flowed by the tides, unlike the banks of rivers, was public property, belonging, in Spain, to the sovereign.

Under the Spanish Law of Waters of 1866, which became effective in the Philippines in 1871, lands added to the shore by accessions and accretions belong to the public domain unless and until the government shall decide they are no longer needed for public utilities and shall declare them to belong to the adjacent estates.

This rule applies not only to accessions to the shore while it is washed by the tide, but also to additions which actually become dry land.

The doctrine that accessions to the shore of the sea by accretion belong to the public domain and not to the adjacent estate has been adopted by the leading civil law countries, including France, Italy and Spain.

In determining what law is applicable to titles in the Philippines, this court deals with Spanish law as prevailing in the Philippines, and not with law which prevails in this country whether of mixed antecedents or the common law.

Where a case is brought up on an appeal on a single question, in regard to which there is no error, judgment below will be affirmed.

THE facts, which involve the title to land in the Philippine Islands formed by action of the sea, are stated in the opinion.

Mr. Oscar Sutro, with whom *Mr. E. S. Pillsbury*, *Mr. Aldis B. Browne*, *Mr. Alexander Britton* and *Mr. Evans Browne* were on the brief, for plaintiff in error:

The Supreme Court of the Philippines erred in holding

that the law, as written in the Partidas, declares that land above seashore formed by accretion from the sea belongs to the Crown and not to the riparian owner. Laws 3, 4, 6, 24, Tit. 28, 3d Partidas.

From the premise that the accessory follows the principal, the conclusion necessarily follows that, under the said Laws 3 and 4 of Title 28 of the Third Partida, the ownership of land, formed by accretion through the action of the sea, is in the riparian proprietor, after it has ceased to be washed by the tides.

From the express language of these definitions it appears that what is "shore" on the border of the sea during a particular year is to be determined by the high-water mark during that year, and that if the year following such particular year the high-water line has receded, then, at the end of such later year, the land between the high-water mark of the earlier year and the high-water mark of the later year is no longer "shore," for the waters have not covered it "when it rises its highest in all the year." And being then neither air, rain, water, sea nor shore, it does not "belong in common to all creatures," for, having expressly mentioned the particular things which "belong in common to all creatures," the lawmakers have thereby impliedly said that no other things than those enumerated "belong in common to all creatures." *Expressio unius est exclusio alterius.* *United States* v. *Arredondo*, 6 Pet. 691; *Sturges* v. *The Collector*, 12 Wall. 19; *Arthur* v. *Cumming*, 91 U. S. 362.

The "shore" at the civil law extended to that part of the land washed by the highest tides. *Galveston* v. *Menard*, 23 Texas, 349, 399; Hall, Mexican Law, 448; Civil Code, Mexico, Art. 802.

Equally as at the common law, the shore, at civil law, was the line of high tide. *United States* v. *Pacheco*, 2 Wall. 587, 590.

The rule at common law, as under the Partidas, is

that the "shore" of the sea belongs to the Crown for the use of the public. But the rule at common law is that accretions from the sea belong to the riparian owner. *Kent* v. *Yarborough*, 1 Dow. & Clark, 178; 3 Kent's Comm. 428; 2 Black. Comm. 262; *New Orleans* v. *United States*, 10 Pet. 662; *Saulet* v. *Shepherd*, 4 Wall. 502; *Banks* v. *Ogden*, 2 Wall. 57; *St. Clair* v. *Lovingston*, 23 Wall. 46; *Jefferis* v. *Omaha Land Co.*, 134 U. S. 178; *Shively* v. *Bowlby*, 152 U. S. 1.

The Law of Ports of 1880 superseded the Law of Waters of 1866.

It thus affirmatively appears from the Law of Waters and from the Law of Ports that the meaning of the term "shore," as used therein, is limited to the area actually being washed by the waters of the sea, and must be held that in the Partidas, the earlier statute, the word "shore" was used in the same sense; for it is a settled rule for the construction of statutes that where it appears from a later statute *in pari materia* that a term is therein used in a particular sense, then it is to be presumed that, in the earlier statute, such term was used in the same sense. *Alexander* v. *Alexandria*, 5 Cranch (U. S.), 1; *United States* v. *Freeman*, 3 How. 556; *Harrison* v. *Vose*, 9 How. 372; *Harris* v. *Runnels*, 12 How. 80; *Farmers' &c. Bank* v. *Dearing*, 91 U. S. 29.

When Laws 3 and 4 of Title 28 of the Third Partida and Laws 6 and 24 of the same title are considered together, the only inference that can be drawn therefrom is that accretions to the "shore" of the sea do not belong to the Crown, even if it be assumed that, as held by the courts below, the term "shore," as used in the Partidas, includes land at any previous time washed by the tides. *Hare* v. *Horton*, 5 Barn. and Ad. 160.

Under the rule that statutes, if doubtful, must receive a reasonable construction, it follows that, under the Partidas, the title to land formed by accretion on the

borders of the sea is not in the Crown, but is in the riparian proprietor. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Beley* v. *Naphtaly*, 169 U. S. 353; *Chesapeake &c. R. Co.* v. *Miller*, 114 U. S. 176, 187.

All reason is against the said interpretation put upon the Partidas by the court. *New Orleans* v. *United States*, 10 Pet. 662, 717; *Jefferis* v. *Omaha Land Co.*, 134 U. S. 178, 192; 2 Black. Comm. 262; *Banks* v. *Ogden*, 2 Wall. 57, 67; *Lamprey* v. *Metcalf*, 52 Minnesota, 181.

Under the rule that, where a statute of one State is adopted by another, it is to be presumed that the interpretation placed upon the original statute is also adopted, and under the Partidas, accretions from the sea do not belong to the Crown, but belong to the riparian owner.

The laws of Spain, as embodied in the Partidas, were drawn largely from the Institutes of Justinian. Hannis Taylor, "Science of Jurisprudence," 162.

The interpretation placed upon the provisions of the Roman law by the writers upon that subject ought to be followed in construing a statute of a country which has adopted such statute from the civil law. *Viterbo* v. *Friedlander*, 120 U. S. 707; *Groves* v. *Sentell*, 153 U. S. 465; *Meyer* v. *Richards*, 163 U. S. 385; Lord Mackenzie's Roman Law, 177; Angell on Tide Waters, 2d ed. 249.

None of the authorities cited by the lower courts in support of their said conclusion lends any support thereto.

The authorities support the contention of the appellant that, under the Partidas, accretions formed by the action of the sea, when they become dry land, by reason of the recession of the high-water mark, belong to the riparian owner. Amandi, Civil Code, Vol. 2, p. 95; Scaevola, Commentary on Civil Code, Vol. 6, 338; Escriche, Dictionary of Law, p. 449.

Under the Law of Waters of 1866, which went into effect in the Philippines in September, 1871, title to lands

formed by accretion vested in the riparian proprietor, and not in the Crown.

This is the doctrine in Louisiana, where the civil law prevails. *Municipality No. 2* v. *Orleans Cotton Press*, 18 Louisiana, 122; *St. Clair County* v. *Lovingston*, 23 Wall. 46, cited with approval in *Nebraska* v. *Iowa*, 143 U. S. 369, and *Shively* v. *Bowlby*, 152 U. S. 1, and followed by the state courts in *Freeland* v. *Penn. R. Co.*, 197 Pa. St. 529, and *Knudson* v. *Omanson*, 10 Utah, 124.

The various provisions of the Law of Waters affirmatively show that the term "shore," as used in that law, includes land being swept by the tides, only, and that when, by reason of accretions, the high-tide line recedes from such land it thereupon ceases to be "shore." Articles 4, 8, 9 of the Law of Waters sustain the contention of plaintiff in error that under the express provisions of the Law of Waters, accretions from the sea, when they are no longer covered by the tides, belong to the riparian owner, and are not a part of the public domain.

The provisions of the Law of Ports of 1880 make it clear that Article 4 of the Law of Waters of 1866 does not have the effect of vesting title to accretions, which have become dry land, in the Government. *Alexander* v. *Alexandria*, 5 Cranch, 1.

The second sentence of Art. 4 of the Law of Waters constitutes a clear recognition of the fact that it was not intended that, under the said law, accretions which had become dry land by reason of the recession of the sea should belong to the Government.

If the lawmakers had intended that, under the Law of Waters, accretions from the sea should be a part of the public domain, even after they had become dry land, they would have said so, and would not have left the question to be settled by the uncertain result of litigation and judicial decision. *National Bank* v. *Matthews*, 98 U. S. 621, 627.

In a case like this, if there is any doubt or ambiguity in the Spanish law, the applicant should have the benefit of the doubt. *Cariño* v. *Insular Government*, 212 U. S. 449, 460.

The Solicitor General for defendant in error:

The land in controversy, having been formed from time to time since the year 1811, down to the present, by accession or accretion, occasioned by the action of the sea, became, as it was formed, a part of the public domain of Spain, and, as such, became, upon the acquisition by it of the Philippine Islands, a part of the public domain of the United States.

All agree that the law as to accretions prior to September 24, 1871, is to be found in the "Codigo de las Siete Partidas." "The Compilation of the Laws of the Kingdoms of the Indies" contained nothing upon the subject, but it was provided by those laws that where they were silent the laws of Castile should be applied both as to right and remedy.

The Partidas bearing upon the case, directly or indirectly, are: Law 1. What is meant by dominion, and how many kinds there are. Law 2. That there is a distinction between the things of this world; that some of them belong to all creatures living; and others not. Law 3. What the things are which belong in common to all creatures living. Law 4. Every man who chooses, may build a house or cabin upon the seashore, as a retreat; and he may erect there, any other edifice whatever, to serve his purposes; provided he does not thereby interfere with the use of the shore, which every one has a right in common to enjoy. He may also build vessels; stretch and mend his nets. Law 5. That he who finds gold, pearls or precious stones on the seashore, acquires the property of them. Law 6. That every one may make use of ports, rivers and public roads. Law 26. The in-

crease which a river makes by accretion to an estate belongs to him to whose estate it is carried, and he who lost it has no claim whatever to it. But not so if by avulsion. See 1 Moreau and Carleton's Partidas, ed. 1820, pp. 334 *et seq.*

In these laws there is a signal difference between the seashore and the river bank. The sea and its shore belong in common to all the living creatures of the world.

The Law of Waters of August 3, 1866, was promulgated, and became effective in the Philippines on September 24, 1871.

While differing from the Partidas in some details, it rests upon the same principle, that the seashore or beach is public property. See Arts. 1, 4, 8, 9, 10. By Art. 4 lands which attach themselves to the shore by accretions and deposits caused by the sea, are of public ownership.

Spanish commentators upon the law of Spain support the position of the Government. 2 Arrazola, Enciclopedia Española Derecho y Administracion, Madrid, 1849, pp. 580–583; 2 Gutierrez Fernandez, Treatise Codigos o Estudios Fundamentales, 86; 7 Alcubilla, Diccionario de la Administracion Española, ed. of 1887, 7, 108.

While Angell on Tide Waters sustains the law of accretions, as contended for by the plaintiffs, as the doctrine of the Roman, French, Spanish, and Louisiana jurisprudence, he is mistaken. See Art. 454 of the Civil Code of Italy, 1865; §§ 556–7, Code Napoleon; 2 Marcadé; Explication, du Code Napoléon, 5th ed., Vol. 2, 439; Littré, in his French dictionary, *sub* "lais" as meaning in law "alluvian." Section 557, present Civil Code of France, Blackwood's translation; Digest of Civil Laws in force in 1808 in Orleans Territory, book 2, 106; and see *Zeller* v. *Yacht Club*, 34 La. Ann. 837.

The weight of authority is against the writers cited by plaintiffs in error, and there is absolutely no authority

to support the contention of plaintiffs as to accretions made since the Law of Waters of 1866 went into effect.

No Spanish authority questions the validity of either the Law of Waters of 1866 or the Law of Ports of 1880. The former owners themselves believed that the Law of Waters applied, that the State had the prior and paramount right to the land and could use it for a public purpose, and that the right of the adjacent owner attached only when the lands were to be put to private use.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought by Ker and Company to recover possession of land held by the defendant under a claim of title in the United States. The land is the present extremity of Sangley Point, in the Province of Cavite and island of Luzon, projecting into Manila Bay. It has been formed gradually by action of the sea; all of it since 1811, about three-quarters since 1856, and a part since 1871. For a long time the property was used by the Spanish Navy and it now is occupied by the present Government as a naval station, works costing more than half a million dollars having been erected upon it. The plaintiffs claim title under conveyances from the owner of the upland. The Philippine courts held that under the Partidas, III, Tit. 28, Laws 3, 4, 6, 24 and 26, and the Law of Waters of 1866, the title to the accretions remained in the Government, and the vexed question has been brought to this court.

That the question is a vexed one is shown not only by the different views of Spanish commentators but by the contrary provisions of modern codes and by the occasional intimations of the doctors of the Roman law. Justinian's Institutes, 2, 1, 20 (Gaius II. 70), followed by the Partidas, 3, 28, 26, give the alluvial increase of river banks to

the owner of the bank. If this is to be taken as an example illustrating a general principle there is an end of the matter. But the Roman law is not like a deed or a modern code prepared *uno flatu*. History plays too large a part to make it safe to generalize from a single passage in so easy a fashion. Alongside of the rule as to rivers we find that the right of alluvion is not recognized for lakes and ponds, D. 41, 1, 12, a rule often repeated in the civil law codes, *e. g.*, Philippine Civil Code of 1889, Arts. 366, 367. Code Napoleon, Art. 550. Italy, Civil Code, 1865, Art. 454. Mexico, Art. 797. If we are to generalize, the analogy of lakes to the sea is closer than that of rivers.—We find further that *In agris limitatis jus alluvionis locum non habet.* And the right of alluvion is denied for the *agrum manu captum*, which was *limitatum* in order that it might be known (exactly) what was granted. D. 41, 1, 16. The gloss of Accursius treats this as the reason for denying the *jus alluvionis*. If this reason again were generalized, it might lead to a contrary result from the passage in the Institutes. Grotius treats the whole matter as arbitrary, to be governed by local rules, and both the doctrine as to rivers and the distinction as to accurately bounded lands as rational enough. De Jure B. & P. Lib. 2, cap. 8, 11, 12. A respectable modern writer thinks that it was a mistake to preserve the passage concerning definitely bounded grants in the Digest, 1 Demangeat, Droit Romain, 2d ed. 441 ('antiquirt' Puchta, Pandekten, § 165), but so far as we have observed this is an exceptional view, and from the older commentators that we have examined down to the late brilliant and admirable work of Girard, Droit Romain, 4th ed. 324, this passage seems to be accepted as a part of the law. At all events it shows that, as we have said, it is unsafe to go much beyond what we find in the books. And to illustrate a little further the uncertainty as to the Roman doctrine we may add that Donellus mentions

the opinion that alluvion from the sea goes to the private owner only to remark that the texts cited do not support it, De Jur. Civ. IV, c. 27, 1 Opera (ed. 1828), 839 n., and treats the rule of the Institutes as peculiar to rivers, as also Vinnius in his comment on the passage stating the rule seems to do, while Huberus, on the other hand, thinks that rivers furnish the principle that ought to prevail. Praelectiones, II, Tit. 1, 34.

The seashore flowed by the tides, unlike the banks of rivers, was public property; in Spain belonging to the sovereign power. Inst. II, Tit. 1. 3, 4, 5. D. 43, 8, 3. Partidas, III, Tit. 28, 3, 4. And it is a somewhat different proposition from that laid down as to rivers if it should be held that a vested title is withdrawn by accessions to what was owned before. Perhaps a stronger argument could be based on the rule that the title to the river bed changes as the river changes its place. Part. III, Tit. 28. Law 31. Inst. 2. 2, 23. D. 41. 1. 7, 5. But we are less concerned with the theory than with precedent in a matter like this, whether we agree with Grotius or not in his general view. The Spanish commentators do not help us, as they go little beyond a naked statement one way or the other. It seems to us that the best evidence of the view prevailing in Spain is to be found in the codification which presumably embodies it. The Law of Waters of 1866, which became effective in the Philippines in September, 1871, and the validity of which we see no reason to doubt, after declaring like the Partidas that the shores (playas), or spaces alternately covered and uncovered by the sea, are part of the national domain and for public use, Arts. 1, 3, goes on thus: "Art. 4. The lands added to the shores by the accessions and accretions caused by the sea belong to the public domain. When they are not (longer) washed by the waters of the sea, and are not necessary for objects of public utility, nor for the establishment of special industries, nor for the

coast guard service, the Government shall [will?] declare them property of the adjacent estates, in increase of the same."

Notwithstanding the argument that this article is only a futile declaration concerning accessions to the shore while it remains such in a literal sense, that is, washed by the tide, we think it plain that it includes and principally means additions that turn the shore to dry land. These all remain subject to public ownership unless and until the Government shall decide that they are not needed for the purposes mentioned and shall declare them to belong to the adjacent estates. The later provision in Article 9, that the public easement for salvage, &c., shall advance and recede as the sea recedes or advances, simply determines that neither public nor private ownership shall exclude the customary public use from the new place. The Spanish Law of Ports of 1880, like the Law of Waters, asserts the title of the State although it confers private rights when there is no public need.

The presumption that the foregoing provisions of the Law of Waters express the understanding of the codifiers as to what the earlier law had been, becomes almost inexpugnable when we find that the other leading civil law countries have adopted the same doctrine. The Code Napoleon, after laying down the Roman rule for alluvion in rivers, Art. 556, 557, adds at the end of the latter Article: "Ce droit n'a pas lieu à l'égard des relais des la mer," which seems to have been adopted without controversy at the Conférence. See further Marcadé, Explication, 5th ed., vol. 2, p. 439. And compare 2 Hall's Am. Law Journal, 307, 324, 329, 333. The Civil Code of Italy, 1865, Art. 454, is to similar effect. See also, Chile, Civil Code, Art. 650. The Supreme Court of Louisiana in like manner confines the private acquisition of alluvion to rivers and running streams, and denies

the private right in the case of lakes and the sea. *Zeller* v. *Yacht Club*, 34 La. Ann. 837. And the provision of the Louisiana Code, Art. 510, is like those of France, Italy and Spain. The court of first instance below refers to judgments of the Supreme Court of Spain that seems to look in the same direction. We have neither heard nor found anything on the other side that seems to us to approach the foregoing considerations in weight, not to speak of the respect that we must feel for the concurrent opinion of both the courts below upon a matter of local law with which they are accustomed to deal. Of course we are dealing with the law of the Philippines, not with that which prevails in this country, whether of mixed antecedents or the common law.

As the case was brought up on the single question that we have discussed the judgment of the court below must be affirmed.

Judgment affirmed.

MR. JUSTICE MCKENNA, dissenting.

I cannot agree with the conclusion of the court. It seems to be conceded that it is not necessarily determined by the authorities which are cited. I think the better deduction from them is that they only declare the constant integrity of the shore, and the dominion of the government over it whether it recede or advance. When it ceases to be washed by the tides or the seas it becomes part of the upland and belongs to the owner of the upland. And this is but the application of the principle, said to be of natural justice, that he who loses by the encroachments of the sea should gain by its recession. *Banks* v. *Ogden*, 2 Wall. 57, 67.